SOME PRINCIPLES

OF THE

Real Property (Land Titles) Acts

OF

WESTERN CANADA

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PREFACE

Some time ago the author wrote out a criticism of a decision on the Acts and submitted it to a friend for his opinion whether it was worth sending to one of the law magazines for publication. The opinion received was that the article was too good for the purpose contemplated and was accompanied by a recommendation to attempt a book along the lines followed in the article. Hence these pages.

One of the few cases containing any general enunciation of the principles underlying the Torrens Acts is *Gibbs* v. *Messer,* ((1891) A. C. 248). The case describes the main object of those Acts as being the limitation of examination of title to a single document, the registered owner's certificate of title. This statement can be developed and added to. It is with the same intention of confining the investigations of purchasers and the like to one document that a certificate of title is made conclusive evidence of a registered owner's estate or interest in his property and an unregistered instrument is rendered incapable of passing any estate or interest in land as against a purchaser or the like transacting with a registered owner in reliance on his certificate of title—the register—even though actual notice of the instrument may have been received; unless to ignore the existence of the instrument would be tantamount to fraud. In short, the fundamental principle of the Acts is that everybody dealing with a registered owner of land is released from all obligation to go behind the owner's certificate of title in order to test its validity or to go outside of the certificate in order to ascertain who, besides the registered owner, are interested in the property and the nature and extent of the interests held.

It has been decided in *Wilkie* v. *Jellett,* (2 Terr. L. R. 133; 26 S. C. R. 282) that an unregistered instrument can pass an estate or interest as against an execution creditor who has registered a writ of execution although he was wholly ignorant of the existence of the instrument and without any

means of discovering that it existed. This decision seems to be directly opposed to principle and the explicit provisions of the Acts; and a directly opposite conclusion has been reached on a similar state of facts and law in *Pim* v. *Coyle,* ((1917) 1 I. R. 330) a case on the Registration of Title Act of Ireland.

A certificate of title being the sole evidence of a registered owner's estate or interest in his property which it is necessary to examine no one transacting with him need search outside of his certificate of title to ascertain whether a certificate of judgment or a writ of execution has been entered or taken out against him. For this reason there appears to be as little authority in principle as there is in express enactment for the practice of suspending the formal registration of instruments presented for registration when a general register or an execution register shows a judgment or a writ to have been recorded against the person who has executed the instrument; a conclusion which does not apply to Saskatchewan now that the Land Titles Act of 1917 makes a certificate of title subject to a writ of execution which has merely been filed, that is, entered in the day-book.

It was also held in *Gibbs* v. *Messer* that registration confers indefeasible title. This fact has a very practical bearing on the character of the caveat; for, to cite the same case again, it is the intention of the Acts to confer on those who acquire mere interests in land the same security as is given to those who acquire proprietary rights. Consequently it would seem to follow that *Grace* v *Kuebler,* (56 S. C. R. 1) cannot be accepted as good law.

The Acts expressly declare that on registration a certificate of judgment or a writ of execution becomes an encumbrance and the judgment or execution creditor an encumbrancee. Registration thus completely changes the character of a judgment or writ and renders available to the creditor the same procedure for the realization of his security as is open to a registered mortgagee. It would seem that in Manitoba this is the only procedure which he is at liberty to follow.

There has been considerable discussion of the question whether registration of an instrument is notice of it; that is, of course, constructive notice. Since the Acts give registered

instruments priority according to their respective dates of registration the doctrine of constructive notice is, of necessity, entirely done away with where registered instruments are concerned; and it is expressly abolished in respect of unregistered instruments.

It has been claimed for the Torrens Acts that they constitute an entirely new system of conveyancing and real property law and that they create a peculiar estate in land as new as the Torrens system itself. It would seem that neither of these claims can be regarded as well founded.

The chapters making up this book have not been written consecutively but as independent monographs and at considerable intervals of time. Much revision was consequently necessary when the monographs had to be arranged as connected chapters. Unfortunately ill-health had supervened and it has not been possible to make the revision as exhaustive as it otherwise might have been. Consequently there may seem to be here some redundancy and there some lack of fullness of statement and for such shortcomings, as also for all others, the author craves indulgence. He believes, however, that notwithstanding any defects the nature of the propositions advanced is sufficiently clear.

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CONTENTS

CHAPTER X.

CHAPTER XI.

CHAPTER XII.

CHAPTER XIII.

TABLE OF CASES

Real Property (Land Titles) Acts

CHAPTER I.

The Certificate of Title as Conclusive Evidence: Owner, Estate and Land.

If anyone coming to the Acts for the first time brings with him an expectation raised in regard to any particular feature in them, it is possible that the offer which they make of a muniment of title behind which it is never necessary to go most appeals to his curiosity and interest. The terms of the offer are as explicit and sweeping as they well can be. A certificate of title, say the Acts, is conclusive evidence, both at law and in equity, and against everybody including the Crown, that the person named in it has the estate specified in the land described in the certificate.[1] Upon their face such expressions can only mean, and have been taken to mean, that, in regard to the owner, he is an existent person whose identity has been determined beyond dispute by the description of him in the certificate of title; that in regard to the owner's estate, the estate disclosed by the certificate can always be relied on as being co-extensive with the owner's real interest in his property; and, lastly, in regard to the land, since the describable particulars of a property for conveyancing purposes consist primarily in its situation, boundaries and area, these must be the particulars concerning the land on which a certificate of title is conclusive. Once a certificate has been issued there must, it would seem, be some means of preserving its evidential finality. This the Acts would appear to supply by compelling the entry on it of memorials of all instruments intended to effect a change in any of the matters certified to, failing which an instrument

[1] Man. 79; Sask. 174; Alta. 44.

will not transfer to the grantee the estate or interest granted.[2] Since title to land can ordinarily be acquired by length of possession,which would expose every certificate to unapparent loss of its conclusive character, the common law title by adverse possession may well have been abolished with the same end in view.[3] Similarly, as the Acts are concerned with beneficial interests and their formal acquisition and charge, and because trusts result in the beneficial interest being in one person and the titular interest in another, no certificate of title is to be issued to a trustee.[4] From provisions such as these it might appear that the intention of the Acts was to create and maintain in existence a land certificate which, from the moment of its birth to the moment of its demise by giving place to another, would continuously record, completely and finally, in whom the actual beneficial ownership resided, the owner's precise estate or interest and the situation, boundaries and area of his property; a certificate the evidential value of which might not improperly be described as "good against the whole world," the expression used in the Land Registry Act of British Columbia down to 1913 of a certificate of indefeasible title.

On the first introduction of the Acts both the profession and the courts construed these provisions in precisely that sense. "It is contended," said Maguire, J., in *Wilkie* v. *Jellett*,[5] "that so long as the certificate of title is in force and uncancelled, the land mentioned therein must be deemed, as against all the world, including persons interested under unregistered instruments, the property absolutely, of the person named therein. . . . That seems to be the view pretty generally held throughout the Territories and in Manitoba." The language of Bain, J., in *Herbert & Gibson*,[6] is to the same effect. "The whole policy and object of the Act," he says, "as shown by section 62 (now 79), and various other

[2] Sask. 58; Alta. 46; implied apparently, in Man. 89 and 98.

[3] Man. 83; Sask. 61. No similar provision in Alta.

[4] As such; Man. 100; Sask. 62; Alta. 47. An exception is made of trustees under a will and an intestacy: Man. 76; Sask. 146; Alta. 74 (4). In Manitoba there is an additional exception of trustees for Church property, Man. 100.

[5] 2 Terr. L. R. at 142.

[6] 6 M. L. R. 191.

sections, is for all purposes and against all the world, to vest the beneficial ownership of the land in the person named in the certificate of title, that is, the registered owner, and there can be no other estate or interest in any one else." On the consequences of any different interpretation Rouleau, J., was most emphatic. If a certificate of title were not held to be conclusive evidence that the registered owner was the actual owner then, he declared, "section 62 which says that 'every certificate of title is conclusive, at law and in equity' . . . would be a trap to deceive the public."[7] Attention seems to have been absorbed by the expressions used in the Acts to confer its evidential finality on a certificate of title to the exclusion of adequate consideration of provisions equally important in determining the Acts' main purpose. But even regarded alone and without relation to other parts of the Acts, the terms in which its conclusive character is given to a certificate of title have to receive limitations. These limitations have relation to three of the several matters respecting which a certificate of title has been made conclusive evidence.

An inquiry into the function discharged by the Dominion Government Survey plans in Western Canadian conveyancing forms a not inappropriate opening to a discussion concerned with registration of title to land, which is part of the general conveyancing practice, since those plans constitute one of the principal foundations of title to land in the West. Occasion for the inquiry is presented by the decision in *Burden* v. *Registrar North Alberta Land Registration District*,[8] where it was held that a certificate of title is not conclusive evidence as to the quantity of the land described in it. The area was stated in the certificate as twenty-seven acres, whereas a re-survey had proved it to be some seventeen acres only; and the purchaser claimed from the assurance fund the value of the deficiency at the rate per acre fixed by the agreement of sale. The action was brought under section one hundred and eight of the Alberta Act to recover damages

[7] *Wilkie* v. *Jellett*, *supra*, at 137. The corresponding sections are now Sask. 174 and Alta. 44. See also *Re Rivers*, 1 Terr. L. R. 464 and *Re Moore and Confederation Life*, 9 M. L. R. 461.

[8] 6 A. L. R. 256.

resulting from a mistake of the registrar. It appeared that the mistake had originally been made in the survey plan of the Dominion Government—a clerical error of 27 acres for 17—and had been reproduced in the Crown grant, whence it had been copied into the first and every subsequent certificate of title. The Court held that the claim could not succeed, since a certificate of title was not conclusive as to area. No authorities are cited in the judgment and as the report does not include the arguments of counsel there is no information available as to the cases referred to on either side. An interested inquirer is thus left to endeavour to find authorities for himself, and when they have been found to state the result.

The essential question was: Had the registrar made a mistake? And the circumstances attendant on the issue of the first certificate of title would seem to have supplied a sufficient answer. The Crown grant for the land had been issued when the first Real Property Act of the North-West Territories was in force, and had been sent direct to the proper land titles office to be exchanged for a certificate of title.[9] The Act contained an instruction to the registrars to make "any necessary qualifications" which could only refer to the qualification of a grantee's estate by the endorsement of mortgages; for homesteads and pre-empted land could be mortgaged after the homesteader's or pre-emptor's rights had matured and before the Crown grant had issued; only transfers of such rights having originally been prohibited, the prohibition not being extended to mortgages until 1898, and then being limited to those given before the recommendation for a grant had been made by the proper official.[10] With this exception the Act nowhere required a registrar to go behind the grant, and there was no legislative hint anywhere else of an intention that he should do so. It will be shown later that, at the most, he could have compared (and probably did compare) the particulars in the grant with those in the Dominion Government survey plan of the township in which the land was situated. But, that apart, all the

[9] Territories Real Property Act, 1886, s. 44.

[10] Dominion Lands Act, 1872, c. 23, s. 33, subs. 17; 1898 (Dom.), c. 32, s. 9.

Act allowed a registrar to do in the circumstances was to copy into the statutory form of certificate of title such of the particulars contained in the grant as the form allowed the insertion of. His function was purely ministerial.[1] There was no room for an error of judgment; only for clerical mistakes due to inadvertence. No clerical mistake had been made, the figures in the Crown grant, which corresponded with those in the Dominion survey plan, having been correctly copied. *The King* v. *Registrar-General of Land*[2] provided an exact analogy. In that case the Crown had purchased land on the strength of a certificate of title which gave the area as 7,334 acres, the actual area proving to be less by some 504 acres. The first certificate of title had been issued pursuant to an instrument which had the effect of a Crown grant, and behind which the registrar was not required nor even allowed to go, and the mistake in the figures had first been made in this instrument. The registrar had correctly copied the erroneous figures into the certificate of title and the Crown sought to recover from the assurance fund as for a mistake made by him. It failed on the ground that he had not made one.

The decision in *Burden* v. *Registrar, etc.,* proceeded on quite other considerations. After stating that a certificate of title was conclusive and a guarantee as to the person named, the land included and the estate specified, the judgment continues: "It is only with respect to the land which is so included that this evidence is created and this guarantee is given. . . . It (the land) is all of the quarter-section south of the river. . . . The registrar by his certificate did nothing more than guarantee that Secord was the owner in fee simple of that particular piece of land. In short, it was title to the parcel and not its acreage that the registrar certified to." The question of mistake *qua* mistake was thus not dealt with at all. As to that the decision is equivalent to saying that it is immaterial whether the acreage is correctly or incorrectly stated in a certificate of title, because a certificate is not conclusive in regard to area.

[1] *The Public Trustee* v. *Registrar-General of Land,* 17 N. Z. L. R. 593.

[2] 24 N. Z. L. R. 946.

These views—as to what a registrar certifies to in describing land in a certificate of title and that he is not concerned to state the area correctly since a mistake in that particular does not afford a ground of action against the assurance fund—would seem to be due to a misconception respecting the function discharged by plans, and in particular the Dominion Government survey plans, in Western Canadian titles and conveyancing.

The misconception is illustrated by the statement in the judgment that "for greater certainty reference is made to the registered plan." This, as appears from an earlier sentence, was the survey plan of the township compiled and issued by the Dominion Government. But, so far from such a plan being referred to for greater certainty, it was, apart from the marks or "monuments" on the ground itself, the only certainty. The physical and documentary evidences of the boundaries and locality of land in Western Canada are the result of the country's circumstances and history. When the territory of the Hudson's Bay Company was taken over by the Dominion the prime problem was its settlement. One of the essential measures to this end was the cutting of it up into parcels of a size dictated by experience as most convenient for individual ownership. The first Dominion Lands Act of 1872 was accordingly passed and all Dominion lands, into which category practically the whole of the provinces of Manitoba, Saskatchewan and Alberta then fell, were directed to be laid off into quadrilateral townships, subdivided into sections of as nearly as possible one mile square, quarter-sections of one hundred and sixty acres, and, in order to facilitate the description for letters patent of less than a quarter section, into legal subdivisions each of forty acres. The situation or locality of these quadrilateral areas was to be described, not by its relation to adjoining properties or physical features, for there were none of the former and few of the latter, but by its distance west from one imaginary line and its distance north from another. The first line was "a certain meridian . . . run in the year one thousand eight hundred and sixty-nine, styled the principal meridian, drawn northerly from the forty-ninth par-

allel of latitude at a point ten miles or thereabouts westerly from Pembina"; the other, the parallel referred to or, to give it its popular name, the international boundary; and accordingly, when an owner describes his property as, for example, section one in township twenty and range one west of the fourth principal meridian, he is really stating in terms of an agreed and arbitrary formula that he owns a piece of land containing about six hundred and forty acres situated some five hundred and sixty-four miles from the principal meridian, and some one hundred and twenty miles from the Canadian-American frontier. A plan was to be made of each township giving these distances west and north, the lengths of the boundaries of each block of land in the township, the nature and position of all boundary monuments and the area of every block.[3] After confirmation by the surveyor-general a plan became the authoritative documentary evidence of the existence of a township and of the situation, boundaries and area of each parcel of land in it. With its copies or reproductions this confirmed plan was the only evidence of the kind. And it remained such until the Crown grants for the lands in the township came to be issued.

It is to be observed that a description of land implies a statement of quantity or acreage. A section in a given township and range is *prima facie* and in the absence of qualifying words a block of six hundred and forty acres. This is a result of the object of the Dominion Lands Survey Act and the Dominion Lands Act. The Dominion government's survey was primarily concerned to create acreages. When the survey was commenced Western Canada was to all intents and purposes a vast single property of the Crown, its limits largely co-terminous with the Crown's jurisdiction; and the survey was undertaken for the purpose of dividing it up into parcels of a size suitable for the kind of private ownership contemplated. The area, shape and boundaries of these parcels were not to be determined by existing physical features.

[3] Dominion Lands Survey Act, 1908, c. 21, ss. 41, 47, 54, 43, 56. The references are given to the present Act for convenience, but the same provisions will be found in the first Act of 1872 and successive revisions. The use of second and other principal meridians serves to avoid high numbers in ranges.

Over large areas such physical features did not exist. The parcels were to be acreages, forty acres and multiples of forty acres, as nearly as possible squares, but in any event quadrilaterals. The standard or unit of private ownership was to be an acreage of one hundred and sixty acres.[4] The acreage of every parcel was to be shown on the plans.[5] But the intention did not stop at the creation of acreages. It was also to grant acreages. Dominion lands were to be sold by the acre.[6] If a grantee found that his land was short of the acreage set out in the Crown grant by one-tenth or more the Government would make up the deficiency by an additional grant if possible, otherwise by refunding a proportionate amount of the purchase money with interest.[7] A grantee was not intended to get the particular parcel of land described in his grant, but the particular acreage which the grant said was being conveyed to him. It was a case of acreage first, last and all the time.

Descriptions of land are either verbal or graphic, that is, stated in words or given by means of a drawing or map. Thus the Dominion Government survey plan of a township contained a graphic description of the locality and area, etc., of every parcel of land shown on it. To be precise, a township plan does not represent the whole graphic description, for that cannot be had save by means of a map showing not only the particular township, but also all the previously surveyed townships, the survey of which has enabled that of the particular township to be made. These earlier surveys are consequently implied. When, therefore, the Crown grant for any parcel in a township came to be issued, there were two ways in which the land granted might have been described. One was to employ a graphic description of the land by inserting in or attaching to the Crown grant a copy of the township plan with the land marked in some fashion; and this method has been adopted, in effect, in Saskatchewan and Alberta when titles are issued to certain companies.

[4] Dominion Lands Act, 1908, c. 20, s. 9.

[5] Dominion Lands Surveys Act, 1908, s. 56.

[6] Dominion Lands Act, 1908, s. 32. This section does not appear in the Act of 1872, but it was implicit and the implication acted on from the beginning. See also s. 27, s.-s. 3, s. 28, s.-s. 5.

[7] Dominion Lands Act, 1908, s. 95.

When a township contains lands belonging to the Hudson's Bay Company, or to a railway company, the official notice that the plan of the township has been confirmed is accepted as the equivalent of letters patent to the company for the lands to which it is entitled.[8] The expression "equivalent to letters patent" used in the Acts, does not, however, fully indicate the real position. The act of Parliament securing or alienating the lands to the company and the notice of confirmation of the plan together constitute the Crown grant; a copy of the confirmed plan supplies a graphic description of the lands; and the three form the documentary evidence of title, estate and land upon which the certificates of title are issued.

But while this means of description was convenient where large blocks of land had been alienated a simpler one was employed in describing land in the ordinary Crown grant. The graphic description of the land in the township plan was translated into its equivalent in words. For, when land is described by section (or part), township, range and meridian, such a description is, strictly, a mere writing out in words of the meaning of those parts of the township plan which contain the representation or drawing of the parcel described and accompanying symbols. This realised the function of the plan in conveyancing and titles become apparent. In a certificate of title for agricultural or unsubdivided land the Dominion Government survey plan of the township in which the land is situated is an integral part of the certificate for the purpose of describing the land. Reference to the plan in such terms as "as shown on a map or plan approved, etc.," adds no certainty to the description. It is impossible to avoid such a reference. The description in a certificate of title, like that in the Crown grant for which it is substituted, is simply a translation into words of the plan and, like all translations, possesses no finality of its own but, of necessity, implies a reference to its original for the ultimate proof of its accuracy; and a reference in a document to a plan is equivalent to the actual incorporation of the plan in the document.[9]

[8] Sask. 47 and 48; Alta. 26 (3) and (4).

[9] *Llewellyn* v. *Earl of Jersey*, 11 M. & W. at p. 189; *Smith* v. *City of Saskatoon*, 4 D. L. R. 521.

So far regard has been had to unsubdivided land. A description of such land, it has been seen, always involves a reference to the Dominion Government survey plans. But it is necessary to widen that statement. A description of any kind of land involves a reference to a plan of some sort. When unsubdivided land is converted into urban property a private plan of subdivision takes the place to a greater or less extent of the Dominion Government plan. Railway companies hold their rights-of-way and station grounds according to the approved plans of each. Irrigation companies hold their waterways according to plans of survey. And so on. In short, every certificate of title involves a reference to a plan, and such a reference makes the plan part of the certificate. It is with this fundamental fact in view that the endeavour has to be made to ascertain what may be supposed to have been the intention of the different legislatures in making a certificate of title conclusive evidence of the land described in it. Putting the problem in the form of a question, the question now to be answered is: Did the legislatures intend to guarantee the accuracy of every plan which might have to be referred to in a certificate of title?

It will be recalled that in *Burden* v. *Registrar, etc.,* the original certificate of title had been issued when the first Real Property Act of the Territories was in force. It would therefore be proper on that account alone to consider the question now raised in the light of that Act. But there is another and equally strong reason for so doing. The Territories Real Property Act was passed by the Dominion Parliament, which had also passed the Dominion Lands Act fourteen years earlier. The same legislative mind was thus behind both acts, an important condition in the construction of legislative intention, since the act of one legislature cannot be construed in the light of the terms of an act passed by another.[10], at least ordinarily.

It has first to be noted that the Dominion Lands Act of 1872 represented a scheme of guaranteed title. The fact that the Crown was the grantor was of itself a guarantee

[10] Sir H. Strong, *G T. Rly. Co.* v. *Washington* (1899), A. C. at 280; *Washington* v. *G. T. Rly Co.*, 24 O. A. R. 189.

that indefeasible title to an estate in fee simple would be conveyed to the grantee. If, however, a double grant were made of the same land, the grantee found not entitled was to be compensated by a grant of other land of the same value, or a refund of the money paid, with interest, provided the claim for compensation were made within a year from the discovery of the error. A grantee was warranted to get at least nine-tenths of the acreage set out in his grant. Any greater deficiency in acreage than one-tenth was to be compensated for by a supplementary grant of land sufficient to make up the shortage, or, if that were impossible, by a refund of a proportionate amount of the purchase-money with interest. The right to compensation held good for five years from the date of the grant. Quiet possession was guaranteed to the extent that if persons were found in unlawful possession the Dominion government would undertake their removal.[1]

Having already established this limited guarantee of title, estate and land beyond which it had not gone in the course of fourteen years, the Dominion parliament made a certificate of title issued under the Territories Real Property Act conclusive evidence of the land described in the certificate. As already observed,[2] the expression conclusive evidence, when applied to the property owned, relates, *prima facie,* to the property's situation, boundaries and area. Taken in their widest possible sense, the terms used amount to a guarantee that the area, boundaries and situation of the land for which a certificate of title has been granted will be found, on an inspection *in loco,* to be exactly as described in the Dominion government survey plan of the township in which the land lies. As this is the construction most favourable to a person transacting in reliance on the register, it is the one proper to assume in an endeavour to prove any case to the contrary and is assumed accordingly. Then, as was said in *Wilkie* v. *Jellett,*[3] when the section giving conclusive effect to a certificate of title was under consideration, "we must

[1] Dominion Lands Act, 1908, ss. 93, 95 and 99.

[2] *Supra,* p. .

[3] *Supra.* See also Sedgwick, J., *Washington* v. *Grand Trunk Rly. Co.,* 24 O. A. R. at 189; Beal's *Cardinal Rules of Legal Interpretation* (2nd ed.), p. 281.

see what the logical consequences would be; and if they would lead to a palpably absurd conclusion such as it could not be conceived the framers of the Act could have intended, we must then return and consider whether the language of those sections is not capable of an interpretation which would not lead to such a conclusion." Applying this recognized principle of construction, if a certificate were conclusive evidence of—guaranteed—the accuracy of the description of the land, what follows? It follows that the Dominion parliament intended the government of the North-West Territories to guarantee, practically without reserve, the accuracy of the Dominion survey plans of all lands within that government's jurisdiction. Such a guarantee was far in excess of that undertaken by the Dominion government itself. It can be said, of course, that there was nothing in making the Territories' government guarantee the distances north and west of the principal meridian and the international boundary respectively, because no owner would think of measuring them over again. Such a suggestion savours of levity, since a guarantee given with the certainty that the guarantor can never be called on to make it good is no guarantee at all; the person guaranteed is just as well off without it. But the boundaries and the area of the land could and would be ascertained sooner or later by an owner, and these would be guaranteed. Clearly a guarantee of accuracy in regard to them would have imposed on the government of the Territories a pecuniary liability far exceeding that which the Dominion government, though greatly stronger financially, was prepared to accept. How great that liability might prove is well illustrated in *Burden* v. *Registrar, etc.* The land had in all probability been sold by the Dominion government at a price not exceeding $3.00 an acre, and if the deficiency had been discovered at the very end of five years from the date of the Crown grant the government's liability would not have amounted to $50.00. The claim against the assurance fund could have been made any time within six years from the date of discovery of the shortage, which might be several years after the grant had been issued, and actually was made twenty years after. In the meantime the

land had enormously increased in value and the compensation claimed, on the basis of the purchase price, was at the rate of $300.00 an acre, or almost $3,000.00 in all. That is to say, the period during which the government of the Territories would have remained liable, had the claim been a valid one, was four times as long as the period for which the Dominion government's liability continued, while the compensation claimed against the government of the Territories was sixty times greater than that claimable against the Dominion government. Can it be supposed that the Dominion parliament ever intended to place on the government of the Territories a liability in respect of the accuracy of the Dominion survey plans so far exceeding that which it accepted for itself? The question supplies its own answer. Still less can it be supposed to have contemplated any such liability in regard to plans not made under the supervision of the Dominion department of surveys such as private plans of subdivision, railway plans, the approval of which only extended to the location, grades and curves,[4] and so on.

Then the new muniment of title was to be a certificate. What may be termed the operative part of it commences: "This is to certify." Now "a certificate *ex vi termini* imports that the party certifying knows the facts he certifies"[5]; or, *semble,* that he certifies in reliance on the knowledge of someone whose statements he is authorised or bound to accept.[6] A registrar obviously could not certify to any particular in a description of land as of his own knowledge, through personal acquaintance with the land described. No provision was made for equipping the land titles offices of the Territories with surveying staffs such as that given to the registrar-general in London for the purpose, *inter alia,* of making surveys of properties in cases in which an owner wishes his land certificate to certify to the boundaries and area. Nor was a registrar anywhere authorized or directed to accept the descriptions in Crown grants or the Dominion survey plans as conclusive. If, then, the

[4] The Railway Act, R. S. C. 1906, c. 37, s. 159.

[5] Lord Kenyon, C.J., *Farmer* v. *Legg,* 7 T. R. (Durnford & East), at p. 191, cited in Stroud's *Judicial Dictionary sub nom. Certificate.*

[6] See *The King* v. *Registrar-General of Land, supra.*

Dominion parliament intended a certificate of title to be conclusive in regard to a description of land, it follows that it was also the intention that this certificate should be given by an individual without that personal knowledge which is ordinarily implied in one who certifies to anything, and without that authority or obligation to certify on the statements of someone else which alone can excuse the absence of personal knowledge. An excellent example of the *reductio ad absurdum.*

Again, in a matter of this kind, the history of the legislation can be gone into.[7] When framing the Real Property Act of the Territories, the Dominion legislature was adapting to Western Canadian needs and circumstances the Torrens System of Australia and particularly, it would seem,[8] the Act of Victoria. Section 212 of that Act, as it now stands,[9] had been added in 1885 and gave an action for damages to any one who had sustained loss attributable to an inaccuracy in a survey or plan or description used upon a sale of land by the Crown. This amounted, in effect, to a guarantee of the accuracy of all Government plans of survey. The absence of any provision of the same kind in the Act of the Territories suggests a deliberate intention not to give a similar guarantee.

But there was something the registrars could certify to without entailing disproportionate or excessive financial responsibility upon the government of which they were officials; and without putting their names to a document of title the nature of which implied in them what they did not possess, namely, a personal knowledge of or a right to rely on the personal knowledge of others for the accuracy of statements made in their certificates. The general practice of the Department of the Interior as far back as the year 1883, has been to forward to the registrars lithograph or zincograph copies of plans of townships, surveys of which had been confirmed by the surveyor-general, as soon as possible after the issue of the confirmed plans. It is reasonable to impute a

[7] Beal *Cardinal Rules of Legal Interpretation* (2nd ed.), p. 286, 3rd, 4th and 5th paragraphs, and cases there cited.

[8] Duff, J., *Smith* v. *National Trust Co.*, 45 S. C .R. at 644 and 645.

[9] Hogg, p. 565.

knowledge of this practice to the Dominion legislature when enacting the first Real Property Act of the Territories and defining the duties of registrars and the effect of a certificate of title.[10] The Act did not enable a registrar to make his own survey. It did not specify the evidence on which he was to issue his certificate. The only evidence in his possession consisted of the Crown grant and a copy of the township plan. The description of the land in the grant was merely a translation of the graphic description in the plan and so was not final. The plan was the sole authoritative documentary evidence of the correct description of the land. With the township plan before him a registrar could certify that a parcel of land had a locality, boundaries and acreage according to the Dominion government survey plan of the township in which the land was situated. And that is all it can reasonably be supposed the legislature intended he should certify to. The fact would be within his own knowledge and the financial risk would be no greater than attaches to the use of all ordinarily efficient human agents. Expressing this conclusion in the terms used when the nature of a description of unsubdivided land was discussed, all the legislature intended in making a certificate of title conclusive as to the land described was that the certificate should be conclusive evidence—should guarantee—that the verbal description in it of the land was an accurate translation of the graphic description in the Dominion government survey plan of the township in which the land lay. Similarly, all that was intended in the case of a certificate of title for subdivided land was that the certificate should be conclusive evidence that a given lot in a given block was held according to a given registered plan of subdivision; which would not constitute a guarantee extending to the frontage and depth of the lot as shown on the plan. And so with all other plans.

When the provinces of Saskatchewan and Alberta were created all laws then in force in the Territories were to continue in force in the new provinces until repealed.[1] The

[10] Beal *Cardinal Rules of Legal Interpretation* (2nd ed.), pp. 369 and 370.

[1] The Saskatchewan Act, 1905 (Dom.), c. 42, s. 16. The Alberta Act, 1905 (Dom.), c. 3, s. 16.

Land Titles Acts of those provinces did nothing or little more than re-enact the latest Land Titles Act of the Territories and neither contained any repealing clause. The new acts were, consequently, merely in the nature of revisions and their effect, therefore, mainly literary.[2] Legislatures are to be credited with a knowledge of the existing law,[3] so those of the new provinces must be regarded as aware of the evidential value attributable to a certificate of title under the Land Titles Act of the Territories, since that Act was one of the statutes of their respective jurisdictions. This latter circumstance makes the rule that an act of one legislature cannot be construed with the aid of an act of another legislature inapplicable in the case of the Land Titles Acts of Saskatchewan and Alberta when the construction is concerned with a section of the Land Titles Act of the Territories reenacted in those provinces without alteration. It follows that the legislatures of the new provinces cannot be supposed, in the absence of express words, to have intended to give a wider conclusiveness to a certificate of title in respect of the land described in it than the Dominion legislature had already given. Certificates of title in Saskatchewan and Alberta are, therefore, only conclusive evidence that the property described is correctly described according to the plan referred to in the certificate either by necessary implication or in express words.

The Real Property Act of Manitoba is, of course, in a different case. The first Act was passed in 1885, the year in which the original Territories' Act, repealed and reenacted the year following, was introduced. The Manitoba legislature must be credited with a knowledge of Dominion law, at least in so far as operative within its own jurisdiction. It must consequently be held to have been acquainted with the scheme of guaranteed title under which Dominion lands in the provinces were acquired. Can it be supposed to have intended to give a guarantee of the accuracy of the Dominion government survey plans beyond anything that government itself gave? Or to guarantee the accuracy of

[2] Craies *Statute Law* (4th ed.), p. 296.

[3] Beal *Cardinal Rules of Legal Interpretation* (2nd ed.), p. 283; Craies *Statute Law* (4th ed.), p. 127, note (y).

plans of subdivisions, etc.? Or that a document called a certificate should be no certificate at all in respect of the land described in it because of the want of personal knowledge ordinarily implied in the individual issuing a document of the kind? Again the questions supply their own answers. Then, the argument from silence advanced in considering the Act of the Territories, applies here also. No guarantee such as that given by section 212 of the Victoria Act is contained in the Manitoba Act, and the former was the model for the latter.[4]

To return to *Burden* v. *Registrar, etc.* If the grounds of that decision held good the plaintiff in the case could not have recovered damages from the assurance fund even if the mistake had been made in the land titles office instead of in the Dominion government survey plan and Crown grant, because a certificate of title was not in any way conclusive as to acreage. Consequently mistakes in acreage would not matter, at all events from the point of view of those desirous of avoiding errors for which the assurance fund might become liable. But when a certificate of title, though not conclusive as to acreage, *is* conclusive evidence of the accuracy of a description as transcribed from a plan an error in acreage made in a land titles office in transcribing a description into a certificate of title *does* render the assurance fund liable. An inaccuracy of that kind is a mistake of the registrar such as is contemplated by the sections of the Acts which give the action for damages.

It remains to consider the net practical effect of the conclusiveness of a certificate of title in the sense suggested. In view of the large allowance made for errors in the Dominion surveys already alluded to, it is impossible to regard a confirmed township plan as more than prima facie evidence of the accuracy of a survey. Lithograph and zincograph copies of confirmed plans are expressly made prima facie evidence merely of their originals.[5] A description of land in a Crown grant, whether taken from the original plan or a copy, can

[4] Curran, J., *Brown* v. *Broughton*, 25 M. L. R. at 500; and see *Re Massey and Gibson*, 7 M. L. R. at 178.

[5] Dominion Lands Survey Act, 1908, s. 69.

be nothing more than prima facie evidence of the situation, boundaries and area of the land. A registrar makes out his certificate of title from a copy of a confirmed plan and a Crown grant. This certificate cannot inherently possess any higher evidential value than the documents on which it is based. The one does not profess to have and the other cannot be regarded as having any but a prima facie value. A certificate of title, therefore, is only a prima facie evidence of the area, boundaries and situation of the land to which it relates.

A certificate of title cannot be conclusive evidence of the existence and identity of the registered owner because the ostensible registered owner may be an entirely fictitious person, as happened in *Gibbs* v. *Messer*,[6] where a dishonest solicitor had forged a transfer of a client's lands to a non-existent person and negotiated a loan to this suppositious individual, signing his name to and otherwise properly executing a mortgage of the lands for registration by the mortgagees. It is quite clear from the facts of the case and from the judgments in the court of first instance, and in the appeal to the Supreme Court of Victoria, whence another appeal was made to the Privy Council, that the mortgagees in their conduct of the transaction and the Victorian courts in their decisions, were influenced by the apparent evidential finality given to a certificate of title by the Transfer of Land Statute. The terms of the statute are not so wide as those of the Acts of Western Canada, but they are quite as explicit. "Every certificate of title issued under the provisions herein contained shall be received in all courts of law and equity as evidence of the particulars therein set forth, and of the entry thereof in the register book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest or a power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."[7] Indeed the impression received of the conclusive character of a certificate of title in the particulars of the identity of the owner

[6] (1891), A. C. 248.

[7] Section 69.

and the nature of his estate is heightened by the fact that a certificate is merely evidence of all other particulars. The solicitor practised in Hamilton; the fictitious proprietor was described in the certificate of title as Hugh Cameron of North Hamilton, grazier; the loan was negotiated by correspondence with a financial firm in Melbourne which was some distance from Hamilton; the duplicate certificates were in the registry office at Melbourne and the draft mortgage was examined on behalf of the mortgagees by a firm of Melbourne lawyers, who, presumably, also searched the title before advising acceptance of the security. It was said by the solicitor in one of his letters that "the title is simple under the Lands Transfer Statute"; and what, indeed, could appear simpler? Here were two certificates under the seal of an officer of the government solemnly certifying that one Hugh Cameron was the registered proprietor of the property described in the certificates; there was a mortgage which, on the face of things, had been properly executed by this registered proprietor, and had been forwarded by his legal adviser; and the duplicate certificates were already available in the registry office. Yet the registered proprietor was a complete myth. When the real owner brought her action to have the fictitious owner's certificate cancelled and her own name restored to the register, the main consideration urged on behalf of the mortgagees was that the certificates were conclusive in their favour that the person named in them as the proprietor actually was such. Both the Victorian courts felt that this contention must be sustained if the evidential finality of a certificate of title was to be a fact and not a figment. Accordingly Webb, J., said in the court of first instance that, "after a full consideration of the whole subject (namely, the conclusive character of a certificate of title as evidence), "I am of opinion that the proper construction of the Act is that a certificate of title when once issued is made conclusive evidence of title, with this exception, that in the case of fraud it is not conclusive in favour of the person guilty of the fraud, or of a person claiming under him with notice of the fraud. . . . Applying to the present case the principle which I have enunciated, supported as it is by all

these authorities, it follows that the certificates of title in the name of Hugh Cameron are void so far as the defendant Cresswell (the solicitor) is concerned, but are valid as necessary to support the title of the defendants McIntyre as mortgagees and *pro tanto* purchasers without notice." [8] Speaking in a similar strain, A'Beckett, J., who delivered the judgment of the supreme court, after a reference to the effect, or rather want of effect of a registered proprietor's receipt of his certificate of title, "which is made conclusive evidence under sec. 47 (now 69) of the Act," said: "We therefore feel no doubt that the certificate of title on which the mortgagees advanced their money, though brought into existence by the forgery of the defendant Cresswell, was as efficacious in their favour as if it had issued upon an honest and regular transaction. That certificate described Hugh Cameron as the proprietor and the mortgagees had the right to rely on the certificate as evidence of his title to an indefeasible estate in the land mortgaged to them" [9]; that is, the certificates could be accepted as conclusively certifying Hugh Cameron to be an existent person whose identity had been ascertained by the description of him in the certificates. "It now appears," the judgment continues, "that no such person as the Hugh Cameron described in the certificates in fact existed." Consequently, unless this situation could be met by the discovery of someone upon whom the description of the fictitious registered proprietor could be fitted, the evidential finality of a certificate of title would be destroyed beyond restoration. The fiction could not have been created except through the agency of an existent person, in this case the defrauding solicitor, so the court seized upon him as the individual to whom the description must be regarded as applying. It was accordingly held that he had, "for the purpose of dealing with this land, assumed the name of Hugh Cameron. It was he who signed the transfer to Hugh Cameron as transferee, and who signed the mortgage to the defendants McIntyre as mortgagor, and he produced the certificates of title of Hugh Cameron for the purpose of having the mortgage registered

[8] 13 V. L. R. 868, *et seq.*
[9] *Ibid.* 876.

upon them. Upon these facts we think that in favour of the mortgagees, he should be regarded as the proprietor of the land with whom they dealt on the faith of the certificates evidencing his title."

But in its eagerness to sustain the conclusive character of the certificates of title the Court overlooked the nature of the fraud which had been committed. Its essence consisted in Hugh Cameron being one person and the solicitor another, so that the latter could not be said to have assumed the name of Hugh Cameron as his own, in other words, adopted it as an *alias*. Instead he had signed an instrument with a name which was not his and so had committed a forgery. This oversight is one of the first things pointed out in the judgment of the Privy Council. The principle is laid down that everyone entering upon a transaction in land must make sure that he is dealing with the very person who is registered as proprietor for "the protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from the registered owner;" a construction equally applicable to the Western Canadian Acts.[10] Consequently, in the particular case before the Board, "the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and seeing that they get a genuine deed executed by that principal rests with the mortgagees themselves." Having omitted this precaution and accepted what had turned out to be a forged document they had received no security for their loan; the registrations made as the result of the fraud had to be cancelled and the real owner's name restored to the register.

The prima facie character of the evidence afforded by the register as to identity has received effective illustration here in the case of the *Northern Trust Co.* v. *Wasylkofsky & Northern Lumber Co., Ltd.*[1] The first defendant was the registered owner of land against the title to which a mortgage had been registered purporting to have been signed by

[10] Man. 99; Sask. 194; Alta. 135.

[1] (1918), 3 W. W. R. 204.

himself. The signature was attested by the affidavits of execution of two witnesses. The defendant denied that he had signed the mortgage and though the witnesses swore that he was the person whom they had seen affix his signature to it, the court held that their evidence failed to establish the fact and decided that the mortgage had not been signed by the defendant.

Thus, explicit though the terms of the Acts are, they cannot be construed as entitling anyone to assume the identity or the existence even of a registered owner. A certificate of title is prima facie evidence merely that the person named as the owner actually is the owner. Indeed that is the only conclusion which suits the facts attendant on registration of title to land under the Acts. John Smith of Edmonton, real estate agent, purchases and has transferred to him quarter sections of land in Alberta; and the circumstances of the transaction may be such as to enable the official signing the certificates of title to feel pretty sure that he is certifying to a fact within his own knowledge, the only sort of fact which anyone, as a matter of practical everyday common-sense, has a right to certify conclusively to. But John Smith transfers one quarter section to John Brown of Winnipeg, manager, and another to James MacJones of Winnipeg, clerk, and these in turn transfer, the former to James Macpherson of Minneapolis, real estate agent, the latter to George Robinson, of Chicago, clerk. The officials in Edmonton know nothing of any of these transferees, who register their respective transfers by mail, nor whether the description of each in his transfer separates him off unmistakably from all other real estate agents, or managers, or clerks with the same names in the towns mentioned; nor, again, whether the signatures to the transfers are those of the persons who purport to have signed them. Each transfer is the merest prima facie evidence of the right of the transferee to be placed on the register. A certificate of title made out on the strength of such evidence cannot possess an intrinsic evidential value higher than that of the instrument pursuant to which it has been issued.

A certificate of title has also been held not to be conclusive evidence so as to bind those who may be described as the

parties to it. Thus it is not final as between the parties to a settlement;[2] nor in favour of a mortgagee who has become registered owner pursuant to a final order of foreclosure as against a mortgagor who alleges that the mortgagee had promised to allow him to redeem the property;[3] nor as against a registered owner who has given a transfer absolute in form, but really as security for a debt, in favour of the creditor who has registered the transfer, and a court will compel the creditor to re-transfer the land, so long as it remains in his hands, upon being paid the full amount of the debt;[4] and when mortgaged land is transferred the new owner's certificate of title is not conclusive evidence in favour of the mortgagee that the new owner is bound by the covenants implied in a transfer of mortgaged land.[5]

Again, the registered owner himself is not necessarily bound by what a certificate of title certifies in regard to the extent of his estate or interest. In *Reeve* v. *Konschur*,[6] two mortgages had been registered and an execution creditor coming in subsequent to the second mortgage paid off the first, but, instead of getting a discharge, took an assignment of the mortgage from the first mortgagee and a transfer of the land from the mortgagor (and execution debtor) with the latter's written acknowledgment that the transfer was intended to operate merely as security for payment of the execution debt. The execution creditor registered the assignment of the mortgage and the transfer. The registrar concerned decided that a merger of the two interests of assignee of the mortgage and transferee of the land had taken place and issued a certificate of title with the second mortgage recorded on it as the first charge. The execution creditor, now registered owner, brought the action in order to have the first mortgage restored to the title so as to give effect to the nature of the transaction; and the second mortgagee contended, inter alia, that the certificate of title was conclusive

[2] *Fonseca* v. *Jones*, 21 M. L. R. at 177.

[3] *Barnes* v. *Baird*, 15 M. L. R. 162.

[4] Perdue, J.A., *Williams* v. *Box*, 19 M. L. R. at 585; *Short* v. *Graham*, 7 W. L. R. at 791.

[5] *Short* v. *Graham*, 7 W. L. R. 787.

[6] 2 S. L. R. 125.

against the registered owner that there was no prior encumbrance. The contention was not sustained, Lamont, J., saying: "Again, while it seems clear that the certificate of title of an owner acquiring title on the face of the register is conclusive evidence of his right, it seems to me equally clear that the conclusiveness of that certificate may be waived or abandoned by the registered owner."

Lastly, it was held in *Wilkie* v. *Jellett*,[7] that a certificate of title was not conclusive evidence regarding the estate or interest specified when an execution creditor with a registered writ was claiming priority over purchasers who, at the time of the registration of the writ, had paid all the purchase-moneys, but only had unregistered instruments in the form of transfers and an agreement of sale in evidence of their titles. This decision has been followed in several subsequent cases, and it has also been held that a certificate of title is not conclusive evidence of the registered owner's estate or interest in favour of an execution creditor as against a prior equitable mortgagee under an unregistered instrument containing stipulations which amount, in equity, to a mortgage of the execution debtor's property;[8] nor against the holder of an earlier equitable mortgage created by deposit of the execution debtor's duplicate certificate of title, or that and a transfer of the property.[9] But for reasons which will appear later, it is believed that the decision in *Wilkie* v. *Jellett* does not represent good law, and the view will be taken that a certificate of title is always conclusive evidence against all unregistered interests in regard to the estate or interest which the certificate shows the registered owner to have at the time when an instrument is registered, fraud apart.

To sum up. Notwithstanding the explicit character of the terms in which a certificate of title is made conclusive evidence of the several matters to which it certifies its actual value as evidence in regard to them is, for the most part, prima facie merely. It is never anything but prima facie evidence of the identity and existence of the registered

[7] 2 Terr. L. R. 133; 26 S. C. R. 282.

[8] *Sawyer & Massey Co.* v. *Waddell*, 6 Terr. L. R. 45.

[9] *Quebec Bank* v. *Royal Bank of Canada*, 9 A. L. R. 435.

owner. It possesses, sometimes, no higher evidential value in regard to the extent of his estate or interest. Though conclusive that the description in it of the situation, boundaries and area of the registered land tallies absolutely with that in the confirmed plan of the township in which the land lies, a certificate of title is still only prima facie in respect of those three particulars. Consequently its value as evidence is for the most part the same as that of a certificate of ownership in Ontario or a land certificate under the English Land Transfer Act, each of which is expressly made prima facie evidence of the matters therein contained.[10] It cannot be supposed, however, that the expressions employed in the Acts, though wider than the exigencies of transactions in lands permit, do not represent a real intention that a certificate of title should in some matters constitute evidence outside of which there is no necessity for anyone dealing with an owner of land to go; and it remains to ascertain what those matters are. But before doing so it is necessary to consider certain aspects of the rule of the Acts that an unregistered instrument is incapable of passing an estate or interest in land.

[10] R. S. O. 1914, c. 126, s. 91; 38 & 39 Vict. c. 87, s. 80.

CHAPTER II.

The Rule against an Estate or Interest in Land Passing by an Unregistered Instrument.

It has been said of the provision which makes an unregistered instrument incapable of passing an estate or interest in land that "the language of that section is as clear as it can be"; and an instrument, in the case in question a transfer, "until registered under the Act, was not effectual to pass any estate or interest in lands."[1] It has also been said that the combined effect of the provision and the conclusive character of a certificate of title is that "there can be no estate or interest in anyone else" besides a registered owner. Statements such as these on the consequences of the rule against an unregistered instrument passing an estate or interest in land are altogether too sweeping. Little reflection is needed in order to realize that such an enactment could not become a rule of law with any wide application. Accepting the necessity of going back to one or two primary distinctions of jurisprudence, it may be recalled what an estate or interest in land is. Interest can, perhaps, be described as the generic term and estate as the specific; for, while an estate is, in law, the same thing as an interest, the extent of the interest is defined by the estate; and an owner's estate in his land is "equivalent to all his right therein."[2] In other words, his estate is the aggregate of the rights which he can exercise over his land and his remedies for preventing their infringement. The ordinary agreement for sale of land constitutes an everyday illustration of some of the limitations set to the operation of the rule. Such an agreement is not a registrable instrument, but the purchaser acquires by virtue of it an equitable estate or interest in the land commensurate with the extent of his performance of the contract.[3] If it lets him into possession, as

[1] *Re Herbert and Gibson*, 6 M. L. R. at 193.

[2] Williams. *On Real Property* (21st ed.), p. 8.

[3] See A Vendor's Interest in the Property Sold, *infra*.

it usually does, his estate, or interest, is by so much increased. Indeed, the entry into possession enables him to exercise all the rights of ownership, "for what could be the purpose or advantage of taking possession except to act as owner."[4] He can maintain the action of trespass[5] and that of ejectment, or, to use its modern name, the action for the recovery of land,[6] at all events against everyone except the registered owner and it is more than doubtful whether a registered owner could take advantage of the sections of the Acts limiting the circumstances under which proceedings for ejectment can be brought against himself[7] where he has wrongfully dispossessed his purchaser after having placed him in possession. A purchaser can obtain an injunction against the committing of waste by a vendor.[8] He can devise his equitable estate or interest by will. If he is married it is subject to his wife's right of dower;[9] and when the contract has been fully performed he acquires the entire beneficial interest in the land, and no writ of execution against the vendor can be levied out of it save in so far as the Acts provide to the contrary.

But perhaps the best commentary on the restricted operation of the rule is supplied by the Acts themselves. After having made an unregistered instrument incapable of passing an interest in land they proceed to enable anyone claiming such an interest under an unregistered instrument to file a caveat to protect the interest.[10] Obviously the interest must have passed by the instrument if the claim is a valid one. Again, an unregistered transfer confers on the transferee a right to register it,[1] in other words, to call for the legal estate. The right to call for the legal estate is a right to call for a legal conveyance of land (a certificate of title);

[4] *Burroughs* v. *Oakley*, 3 Swanst. at p. 170.

[5] *Star* v. *Rookesby*, 1 Salk. 335; *Graham* v. *Peat*, 1 East. 244; *Garrioch* v. *McKay*, 13 M. L. R. 404.

[6] Jessel, M.R., *General Finance, etc., Co.* v. *Liberator Society* (1878), 10 Ch. D. at 24.

[7] Man. 84; Sask. 159; Alta. 104.

[8] Williams *V. & P.* (2nd ed.), 518.

[9] Man. (1919), c. 26, s. 2, s.-s. (7) and s. 13.

[10] Man. 138; Sask. 128; Alta. 84.

[1] Man. 98. The right follows by necessary implication.

and "the right to call for a conveyance of the land is an equitable interest or an equitable estate.[2] It is therefore no part of the purpose of the Acts to render an unregistered instrument wholly incapable of passing an interest in land, and there are thus left to be determined the circumstances under which it cannot do so. This inquiry forms part of the larger investigation concerned with ascertaining the matters in regard to which a certificate of title is conclusive evidence.[3]

[2] Jessel, M.R., *London & South-Western Rly.* v. *Gomm*, 20 Ch. D. at 581.

[3] See next chapter.

CHAPTER III.

THE CERTIFICATE OF TITLE AS CONCLUSIVE EVIDENCE (*Continued*).

TITLE AND ESTATE.

The view that "the whole object and policy" of the Acts was to create a muniment of title which should be conclusive evidence in certain specified particulars "against all the world," has proved untenable. The first Real Property Acts of Manitoba and the Territories were passed when the fashion of preambles still obtained. A preamble may be usefully looked at as a guide to the scope and object of an Act;[1] may, indeed, be regarded as the key to the Act.[2] These rules apply, though the preamble has been omitted from a statute on a revision, for the repeal even of its preamble does not affect the construction of a statute, and resort can be had to the unabridged Act.[3] The preambles have long since disappeared from all the revised provincial statutes. In an endeavour, therefore, to determine what the real purpose of the Acts is, it will be as well to go back to the earliest legislation. The preambles of the two original Acts are identical and run: "Whereas it is expedient to give certainty to the title to estates in land in the Province of Manitoba (or in the Territories), and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive: Therefore, Her Majesty, etc." Simplicity being not only an end in itself, but a desirable condition of certainty, and one essential to inexpensiveness, a first step towards the attainment of all three objects was the simplification of tenures and their incidents. Most if not all of the enactments passed for this purpose formed part of the two original Acts, but many of them were afterwards transferred to other statutes

[1] Beal *Cardinal Rules of Legal Interpretation* (2nd ed.), p. 235, and cases there cited.

[2] Craies *Statute Law* (4th ed.), p. 185 and cases there cited.

[3] *Ibid.*, pp. 188 and 189.

where they are now to be found. The extent to which the English law of real property was to be adopted when the territories of the Hudson's Bay Company were acquired by the Dominion having been made dependent upon the degree to which that body of law was suitable to the circumstances of the new country, the law immediately underwent a process of simplification wholly independent of legislative action and due to the operation of what may be called natural causes. Western Canadian titles were as recent as the country itself was new and consisted of grants direct from the Crown of the fee simple; and conveyances from individual to individual were almost without exception of the same estate. Consequently there was no possibility even of the adoption of English rules of law relating to a variety of estates and interests in land proper to an historic, wealthy and variegated society. There was no place, for example, for entailing settlements or for the law of copyholds or of advowsons. The creation of the first seems justified only when there are old family honours or family estates to be preserved;[4] the second presupposes ancient manors and manorial customs; while the third could hardly exist without an established church. But there still remained in the Western Canadian law of real property certain tenures and incidents which, though some might be practically obsolete, it was thought desirable to abolish by express enactment. Accordingly, an entail was made to convey the fee simple; tenancy by the curtesy, the devolution of the real estate upon the heir, taking by entireties, and the right of dower were done away with; and a husband was enabled to convey land to his wife without the intervention of a trustee.[5]

But the formal abolition of tenures and legal incidents for which there was no social foundation could only comprise part, and a small part, of any simplification of dealings in land and could have little influence on certainty of title or in rendering title easier of proof. Such transactions were chiefly complicated through the somewhat elaborate procedure which had to be followed in conveying title. Its most

[4] Williams *On Real Property* (21st ed.), p. 102.

[5] See now R. S. M. 1913, c. 54; R. S. S. 1909, c. 43; L. T. A. (Sask.), 1917; C. S. A. 1915, 1906, c. 19.

exacting feature was the obligation laid on a purchaser of making an exhaustive examination not only of the conveyance to the vendor and into his dealings with the property, but also of the conveyances to each of his predecessors in title for a number of years varying with the nature of the estate or interest intended to be purchased and into their dealings with the property. A register of titles and landowners was created. It was not made compulsory on owners of land to register their lands under the Acts. Registration became automatic, however, in the Territories in 1886 and is automatic in Alberta and Saskatchewan to-day by reason of the practice of the Department of the Interior of forwarding all Crown grants of Dominion lands direct to the land titles office of the registration districts in which the lands granted are situated for certificates of title to be substituted in their stead. There is no similar practice in regard to Crown grants of Dominion lands in Manitoba, the grants being delivered to the grantees themselves; but in that province registration is compulsory when land is subdivided for the purpose of being sold in lots. A certificate of ownership, called a certificate of title, was to be issued to every registered owner. In order to secure the element of certainty in the making out of these certificates an hierarchy of official conveyancers, or registrars, was established, to whom, each in his several jurisdiction, a present or intending owner of land was to submit his documents of title, and who, if the documents were satisfactory, would make out the official certificate of ownership, the registrar retaining the certificate to form part of the register, or official record of title, and issuing a duplicate original to the owner for his convenience.[6] Persons desiring to obtain title to any lesser or other estates or interests than the fee simple were in like manner to secure the making on the register of the necessary official memorials or entries. The most careful of official conveyancers might, however, commit errors of judgment or be misled,[7] or make a wrong entry,[8] or issue a certificate incorrect in

[6] *Rex* v. *Toronto Gen. Trusts Corpn.*, 56 S. C. R. 26.

[7] As by a forgery *Brown* v. *Broughton*, 25 M. L. R. 489; *Re Adams & McFarland*, 6 W. W. R. 1076; *Fialkowski* v. *Fialkowski*, 4 A. L. R. 10.

[8] *Setter* v. *Forbes*, 8 A. L. R. 191.

some particular, or to a person not entitled to it.[9] Absolute certainty of title could not, therefore, be assured, so the nearest approach to it was made in the shape of a complementary undertaking, with reservations, to pay the money value of any defect in a title occasioned by a mistake of a registrar.[10] The certificate of title was to be a conclusive evidence of an owner's title to his property, and of his estate or interest in it.[1] The effect of this provision was, first, to eliminate the old laborious investigation of a long chain of title in order to test the legality of a present owner's right to his property and, next, to confine the examination of a title for registered land to the official certificate of ownership, which stood for what had previously been the last deed in a chain of title, the conveyance to the then owner. By these means the two objects of certainty of title and easy proof of it were intended to be attained. Certainty of title was secured by the creation of the official certificate of title (constituting the register), the reliability of which was, to the extent possible, guaranteed. Proof of title was facilitated by the endowment of this certificate with the evidential quality of conclusiveness, and so making it (with the instruments recorded on it) the only evidence necessary to be examined in order to determine who were interested in a property and the nature and extent of the interests held.

That it was the chief purpose of the Acts to effect this reduction in the range of the inquiry which formerly had to be made into the documentary evidences of title has been so held in *Gibbs* v. *Messer*,[2] a case on the Transfer of Land Act of Victoria. "The main object of the Act and the legislative scheme for the attainment of that object appear to their lordships to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register to investigate the history of their author's title and to satisfy themselves of its validity." The Victorian statute is very similar to the Manitoba Act.[3] For material purposes the Real Property Act

[9] *Nicholson* v. *Drew*, 5 S. L. R. 379.

[10] Man. 154; Sask. 160, 170; Alta. 108, 121.

[1] Man. 79; Sask. 174; Alta. 44.

[2] (1891), A. C. at 254.

[3] Curran, J., *Brown* v. *Broughton*, 25 M. L. R. 489.

of New South Wales and the Land Titles Act of Alberta are alike.[4] The Acts of Alberta and Saskatchewan are simply provincial re-enactments of the Land Titles Act of the North-West Territories. Consequently the similarity which obtains between the Alberta Act and that of New South Wales also obtains between the latter Act and that of Saskatchewan. In regard to the matters in point here the provisions of the two Australian and of the three Western Canadian acts are the same. The preambles of the Australian acts are identical with each other and with the preambles of the acts of Manitoba and the North-West Territories. Like the acts of Western Canada, both the Australian acts contain sections making a certificate of title conclusive evidence that the person named in it is seized of the estate or interest specified in the property described.[5] The description in *Gibbs* v. *Messer* of the principal object of the Victorian Act can, therefore, readily be accepted as equally descriptive of the principal object of the Acts of Western Canada.

An obvious fact about the relief thus afforded is that it must primarily concern a particular category of persons, namely, those who from time to time become involved in transactions with registered owners of land. Like the acts of Victoria and New South Wales, the Western Canadian acts explicitly declare the relief to be intended for persons coming within that category. No one dealing with a registered owner is to be under any obligation to ascertain how he or any previous owner became such, fraud apart.[6] The Acts are not to be regarded, therefore, as they seem in some measure to have been regarded, as having aimed at the creation of an abstractly perfect system of registration of title to land and that as an end in itself, but rather at the limited and practical object of meeting the convenience of the class of the community chiefly interested in the security and freedom of transactions in land, and which is best typified in the

[4] Fitzpatrick, C. J., *Rex* v. *Toronto Gen. Trusts Corpn.*, 56 S. C. R. at 28.

[5] Hogg, p. 517, s. 59; p. 106, s. 40.

[6] *Ibid.*, p. 541, s. 140; p. 107, s. 43; Man. 99; Sask. 194; Alta. 135.

purchaser or mortgagee for valuable consideration. And they do this, in part, by rendering it unnecessary for such persons to go behind a certificate of title — the register — in order to test the validity of a registered owner's right to his property.

But that is not the whole of the reduction intended to be effected in the extent of the inquiry which formerly had to be made into a title for land. It is with the same end in view, of relieving a purchaser, or anyone in the like situation, from all necessity for going outside of the register—the certificate of title—that an unregistered instrument, that is, an instrument a memorial of which does not appear in the register, has been made incapable of passing an estate or interest in land.[7] The rule has always been read with those sections only which make a certificate of title conclusive evidence. But its primary context is the provision that no one dealing with a registered owner can be affected by notice direct, implied or constructive, of any unregistered interest unless to ignore such notice as may have been received is tantamount to fraud.[8] To say that a person dealing with a registered owner cannot be affected by notice of an unregistered instrument is exactly the same thing as saying that an unregistered instrument cannot pass an estate or interest as against him.[9] *A fortiori* an unregistered instrument cannot pass an interest or estate against such a person when he is entirely ignorant of its existence. Thus, precisely as anyone dealing with a registered owner is not intended to go behind the owner's certificate of title—the register—in order to ascertain whether the title has been properly come by, so it is also not intended that he should have to go outside the owner's certificate of title—the register again—in order to discover who, besides the registered owner, are interested in the property. His examination of the title is to be confined to what is disclosed by the owner's certificate of title in the shape of the original record and such subsequent dealings with the property as are revealed by the memorials entered on the certificate—the register once more. Dealings not so

[7] Man. 89 and 98; Sask. 58; Alta. 41.
[8] Man. 99; Sask. 194; Alta. 135.
[9] Man. 89 and 98; Sask. 58; Alta. 41.

recorded are no concern of his for they are no part of the register in reliance on which he is transacting. It is possible, of course, that notwithstanding the fact that an interest is unregistered the person dealing with a registered owner may be aware of its existence. But this actual knowledge will not prevent him from effectively registering his transfer or other instrument and obtaining title unless the registration would constitute a fraud on the party interested under the unregistered instrument. Consequently, fraud apart, a purchaser or the like dealing on the strength of the registered owner's certificate of title is wholly unaffected by the existence of any interest in the property which is not recorded on the certificate. An instrument evidencing an unrecorded interest in the property with which he is dealing does not pass the interest as against him. The following opinion of James, L.J., in *Lee* v. *Clutton*[10] is directly in point here: "It would, I think, be quite inconsistent with the policy of the Register Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests." It would be equally inconsistent with the policy of the Canadian Acts, which tell a purchaser or mortgagee that a prior unregistered instrument cannot pass an estate or interest in the property proposed to be bought or mortgaged as against a later registered instrument, fraud excepted, to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. Thus the rule against an unregistered instrument passing an estate or interest in land renders it unnecessary, and is intended to render it unnecessary, for such a person to go outside of a certificate of title — the register — in order to discover who, besides the registered owner, hold interests in the property and the nature and extent of the interests held.

This conclusion compels another. For a person transacting in reliance on it the register is conclusive evidence of a

[10] 46 L. J. Ch. at 49.

registered owner's beneficial estate or interest in his property; and this beneficial estate or interest is irreducible by any interest or estate not appearing by memorial on the register, that is, one which has not been registered.[1] Under the state of law which the Acts were to supersede courts of equity refused to deprive a purchaser of a legal estate acquired without notice of an equitable interest,[2] provided the purchaser had exercised the degree of prudence which equity demanded of him in investigating the title.[3] This legal estate represented the vendor's beneficial interest in the property sold. Only beneficial interests are bought or taken as security for loans. Under that state of law, therefore, and whatever the facts, a purchaser secured the beneficial interest of the vendor as disclosed by his title deeds and such evidence as the law considered necessary for a purchaser to examine before he could determine what interests, if any, had been acquired in the property by others. Clearly it could not have been the intention of the legislatures to place a purchaser in a less advantageous position under the new system of conveyancing which they were introducing than he was under the old. Since, under the old system of conveyancing, he got, whatever the facts, the owner's beneficial interest as disclosed by the evidences of title which the then existing law made it obligatory for him to examine, namely, those of which he had actual, implied or constructive notice, therefore, under the new system, in order not to be in a worse position, he must get, whatever the facts, the registered owner's beneficial interest as disclosed by the evidences of title which the rules of the new system require him to investigate. In regard to the validity of a title those rules limit him to the last muniment of title, the registered owner's certificate of title. In regard to estates or interests alienated by a registered owner since he became such, or since then otherwise acquired by third parties, those rules, and

[1] It is necessary to emphasize this in view of the decision in *Wilkie* v. *Jellett*, and the cases in which it has been followed (see ch. iv., *infra*), and the prevailing practice in regard to certificates of judgment and writs of execution.

[2] *Pilcher* v. *Rawlins*, L.R. 7 Ch. 259.

[3] Maitland's *Equity*, p. 124.

more especially the rule against an unregistered instrument passing an estate or interest in land even when notice of it has been received—fraud apart—limit a purchaser's inquiry to the instruments memorials of which appear on the certificate of title, in short, to registered instruments.[4] Consequently, when the vendor's certificate of title and instruments registered on it have been examined, a purchaser, in order not to be in a worse position under the Acts than he was under law and equity, must obtain, whatever the facts, the beneficial interest of the registered owner as shown by his certificate of title and instruments recorded on it, provided, of course, he registers his transfer in the manner prescribed by the Acts. That is to say, the register is conclusive evidence of a registered owner's beneficial interest in his property.

But it was conceivable that circumstances might present themselves which would place the courts in doubt as to whether they ought not to apply the old rules of law or equity and permit an inquiry into a registered title's history and validity or enforce an unregistered interest. So the Acts proceed in the most explicit terms to remove all uncertainty on the subject. A certificate of title is made conclusive evidence in courts of law and equity of a registered owner's title—they are deprived of all jurisdiction to open an inquiry into a title's validity, fraud and the existence of a prior certificate excepted.[5] Next, a certificate of title is made conclusive evidence in such courts of the estate or interest specified in the certificate,[6] and an unregistered instrument is rendered incapable of passing an estate or interest in land as against anyone with notice of the instrument when to ignore the notice does not amount to fraud—*a fortiori* as against a person without notice of it—any rule of law or equity to the contrary notwithstanding;[7] courts of law and equity are deprived of all jurisdiction to enable an unregistered instrument to pass an estate or interest in land, fraud aside. But

[4] An instrument has been registered when a memorial of it has been entered on the certificate of title for the land to which it relates. See THE REGISTER, REGISTRATION AND PRIORITY, *infra*.

[5] Man. 79, 80; Sask. 174; Alta. 44.

[6] *Ibid.*

[7] Man. 99; Sask. 194; Alta. 135.

the existing law which gave a purchaser the vendor's beneficial estate or interest as disclosed in the evidences of title which it was his duty to examine and would not allow it to be impaired by an outstanding equitable estate of which he had not received notice is not merely left unaltered but is actually extended to a purchaser's advantage. The Acts relieve him from the former consequences of notice direct, implied, or constructive, of an unregistered interest if there is no suggestion of fraud.[8] Consequently, a purchaser is left by the Acts to acquire what he always had acquired under the previous state of the law, the beneficial interest as disclosed by such evidence of title as he had to investigate which, under the Acts, is the register and the register alone. That investigation made and his transfer registered courts of law and equity are impotent to deprive a purchaser of that beneficial interest save for fraud and where there is an earlier certificate of title for it in existence.

A good deal has been made on more than one occasion of the limitation placed to a certificate of title's conclusiveness by the expression "while . . . in force and uncancelled,"[9] and the expression has been regarded as conferring on a court of equity if not an unfettered at all events a very wide jurisdiction to relieve against a certificate's evidential finality. No such construction can be placed on the phrase. The Acts specifically provide for cancellation of a certificate of title in certain cases,[10] and these must be regarded as had in contemplation at the time. It is impossible to say that other cases cannot arise to justify cancellation. But this much is certain. No court of law or equity can meddle with the conclusive character of a certificate of title to the prejudice of anyone who has transacted in bona fide and for value in reliance on it, and has registered his transfer or other instrument or has altered his position for the worse. The terms in which they are prohibited from so doing are too plain to be got over. In addition an equally

[8] *Ibid.*

[9] Man. 79; Sask. 174; Alta. 44. See for example the comments in *Williams* v. *Box*, 44 S. C. R. at 12 and 13.

[10] *E.g.* fraud and a prior certificate of title: Man. 79, 80; Sask. 174; Alta. 44; and see also Sask. 87 and Alta. 76.

clear though implied prohibition lies in the fact that for them to do so must defeat the very purpose for which the Acts exist, which is to secure to everyone who deals in reliance on their provisions an indefeasible title to whatever estate, interest or right it appears from the register it is open to him to acquire.

The expressions used in the Acts to confer its evidential finality on a certificate of title are not, perhaps, the happiest. The impossibility of giving effect to their prima facie meaning in regard to the owner's existence and identity and the situation, boundaries and area of a property has gradually become apparent. So in this matter of an owner's estate or interest, the real end proposed to be attained by the conclusive character given to a certificate of title may take some consideration to arrive at. But that end is unmistakable and can be illustrated by comparision with the English Land Transfer Act. The relevant section of that Act runs: "A transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances belonging or appurtenant thereto subject as follows, (1) To the encumbrances if any entered on the register. (2) Unless the contrary is expressed on the register to such liabilities, rights and interests if any as are by this Act declared not to be encumbrances but free from all other estates and interests whatsover, including estates and interests of Her Majesty, her heirs and successors." After registered encumbrances and liabilities which are not encumbrances have been allowed for what remains is the owner's beneficial estate or interest. And it is indefeasible title to this beneficial estate or interest which registration under the English Act secures to a purchaser.[1]

The Acts of Saskatchewan and Alberta contain a somewhat similar provision which read as follows: "The owner of land for which a certificate of title has been granted, shall hold the same subject (in addition to the incidents implied

[1] 38 and 39 Vict. c. 87, s. 30. The Ontario Act is in similar terms, but makes a land certificate subject to unregistered equitable interests.

by virtue of this Act) to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title . . ."[2] The title to land under these Acts is an absolute title in the sense in which that expression is used in the English Act;[3] for the statutory form of certificate certifies that the owner has an estate in fee simple. The incidents to which his estate is subject by implication are similar in character to the liabilities attaching on registered land under the English Act. Encumbrances, etc., notified on the folio of the register constituting a certificate of title are registered interests, for the entry of a memorial of an instrument on a certificate of title is registration of the instrument.[4] When allowance has been made for implied incidents and registered interests what remains is the owner's beneficial estate or interest in his property. And to this estate or interest he has a title indefeasible save by fraud and a prior certificate.

The only difference between the provisions of the English Act and those of Saskatchewan and Alberta in this connection is that the English act describes what a transferee who registers his transfer will get when he becomes a registered proprietor, while the two Canadian acts state what a transferee who has registered his transfer and received his certificate of title, in short, a registered owner, has. But this difference is a difference of expression only. Provided the state of the register is not changed by the earlier registration of another instrument, a purchaser of registered land under the English act, who registers his transfer, gets the beneficial estate which the vendor purports to transfer to him; and it is in his power to prevent any change to his prejudice being made in the register by himself registering a priority notice. Conversely, and given the same condition of an unchanged

[2] Sask. 59; Alta. 42.

[3] Section 7.

[4] Sask. 2. s.-s. 11 (b), 27, 49; Alta. 2 (m), 21, 22.

register, the beneficial estate held by a registered owner under the Acts of Alberta and Saskatchewan when his certificate of title is first issued to him is the beneficial estate which he held when he was a mere purchaser; and, as a purchaser, he can prevent any alteration in the register to his prejudice by registering a caveat.[5] In each case the intention of the parties is, the vendor to transfer and the purchaser to obtain the beneficial interest as shown by the register at the time when the transaction is entered into. In each case, too, the English act on the one hand and the Saskatchewan and Alberta acts on the other, by express provision confer this registered beneficial estate or interest on a purchaser after he has registered his transfer. Under none of these acts can an unregistered interest impair the beneficial estate as appearing from the register at the time when the transfer, or priority notice, or caveat is registered. One result of this position in England is that on a sale of registered land no search is made outside the register for judgments against a vendor. It is equally unnecessary to search outside the register for writs of execution against a vendor in Alberta;[6] but owing to the last Land Titles Act of Saskatchewan having made a certificate of title subject by implication to a writ which has merely been filed,[7] that is, entered in the day book,[8] a purchaser of land in that province has to search the execution register. Although the Real Property Act of Manitoba contains no section defining, in so many words, a registered owner's beneficial estate as do the Land Titles Acts of the other two provinces, yet, as has been seen, the definition is of necessity implicit in the Act.

This identity between the estate transferred and that acquired after registration of a transfer illustrates the double aspect of the conclusive effect of a certificate of title. On the one side it is a representation to anyone dealing with a registered owner that, whatever the facts, he can deal in reliance on the record in the certificate regarding the owner's

[5] As to this see THE CAVEAT, *infra*.

[6] See further as to this CERTIFICATES OF JUDGMENT, ETC., *infra*.

[7] Sask. 60 (e).

[8] Sask. 2, s.-s. 12.

title and beneficial interest as though they were absolutely true. But if this reliability is to be of any practical use to the person to whom it is offered he must be able to obtain for himself a conclusive, that is to say, an indefeasible title to the beneficial interest of the owner as recorded on the certificate of title, whatever undisclosed defect, such as fraud, may actually exist in the title, or whatever undisclosed limitation, such as an unregistered estate, there may actually be on the owner's apparent beneficial interest. This other aspect of a certificate of title's conclusive effect is brought out in *Gibbs* v. *Messer*.[9] "That end," reads the judgment (of saving anyone dealing with a registered owner from having to go behind the register to investigate the history of a title and assure himself of its validity) "is accomplished by providing that everyone who purchases in bona fide and for value from a registered proprietor, and enters his deed of mortgage or transfer on the register thereby acquires an indefeasible right notwithanding the infirmity of his author's title." The Act of Victoria contains a provision[10] similar in terms to those of the Acts of Alberta and Saskatchewan of which mention has just been made. The indefeasible right got by registration extends, of necessity, to the beneficial interest of the owner as disclosed by the register because an indefeasible title to an indeterminate beneficial estate or interest is of no use to anyone. It is only ascertained beneficial estates or interests that are bought or taken as security for loans. In the case of Manitoba this two-fold aspect of the conclusiveness of a certificate of title, though not set out in express words in the Real Property Act, is necessarily inherent in the provisions, common to that Act and the Acts of Saskatchewan and Alberta, which do away with all need for examining into a title's validity and for inquiry after unregistered interests.

It is now possible to indicate the function of the sections which give its evidential finality to a certificate of title in the particulars of title and estate and make an unregistered instrument incapable of passing an interest or estate in land

[9] *Supra.*

[10] Section 74.

even when notice of it has been received, fraud excepted. It has been seen that the sections are addressed to persons dealing with a registered owner. Consequently they must be read together. When regarded in this proximity their significance and effect become fully apparent. They are component parts of a single provision. Their collective function is to create and delimit the Register. They make the register to consist of the last certificate of title and such instruments as have been recorded on it by appropriate memorials since its issue. For everyone who transacts with an owner of land entered in it they constitute the register the sole evidence of title and estate necessary to be examined in order to determine the owner's beneficial interest in his property. They declare that evidence to be conclusive and final. They deprive courts of equity and law of all jurisdiction to admit extraneous evidence to rebut it except in case of fraud, and when a prior certificate for the same estate exists. Saving these exceptions they enable everyone dealing on the faith of the register who registers his transfer or other instrument to obtain an unimpeachable title to the beneficial interest of the registered owner as disclosed by the register, notwithstanding the existence of an actual defect in the registered title, or the actual reduction of the registered beneficial interest through the existence of an unregistered interest. This register with its evidential quality of conclusiveness is the foundation upon which all the rest of the legislative scheme embodied in the Acts is reared. It is the basis, in the eyes of the Acts, of every transaction in land, and in reliance on which every such transaction is intended to proceed. Anyone who fails to comply with the provisions governing the relations of his transaction to it does so at his peril and must take the consequences of his indifference or neglect or ignorance.

The indefeasible title created by the Acts is obtainable by everyone who deals on the faith of the register. "Prima facie," runs another part of the judgment in *Gibbs* v. *Messer*,[1] "it does appear to have been the intention of the Act (of Victoria) to confer the same kind and degree of security

[1] (1891) A. C. at 254.

upon all persons who, transacting in reliance on the register, acquire either proprietary rights or mere interests in land in good faith and for valuable consideration." It had been contended that registration of a mortgage did not give to a mortgagee the same absolute right as registration of a transfer gave to a transferee, and it was that particular contention which was being met in the sentence quoted. This construction of the scope of the Acts embraces a purchaser of land under an agreement of sale by which the price has been made payable in instalments who has registered a caveat founded on the agreement; for, as has been seen, the judgment applies equally to the Canadian Acts. The construction thus has a material bearing on the character and effect of a caveat, the registration of which must secure for the caveator some sort of indefeasible right.[2]

But dealing on the faith of the register does not of itself confer indefeasible title. The instrument of grant or charge must be registered. "That end," to cite *Gibbs* v. *Messer* once more, "is accomplished by providing that everyone who purchases in bona fide and for value from a registered proprietor and *enters* his deed of mortgage or transfer on the register, *thereby* acquires an indefeasible right notwithstanding the infirmity of his author's title." Yet this condition precedent, simple and obvious though it may appear when thus baldly stated, can be and has been overlooked. *Bain* v. *Pitfield*[3] is an illustration. The registered owner had sold a property held in trust. The purchaser, who did not know of the trust, searched the title, which he found clear save for a mortgage which he was to take over. He neglected to register a caveat. While part of the purchase-money was outstanding, an execution creditor of the *cestui que trust,* ignorant of the sale, registered a *lis pendens* in an action to have the registered owner declared a trustee and the property subject to the judgment debt, and eventually got judgment by default. The purchaser, without examining the title again, paid the rest of the purchase-money to the vendor and received a transfer, becoming aware for the first time of

[2] See further as to this: THE CAVEAT, *infra*.

[3] 26 M. L. R. 89.

the registration of the *lis pendens* after the transfer had been lodged for registration. He accepted title subject to it and brought this action for its removal. Judgment was given in his favour on the grounds that, owing to the conclusive character of a certificate of title and the impossibility of his being affected in the absence of fraud by notice of an unregistered interest which, in the eye of the Act, the execution creditor's interest was held to be, he had a right to be registered as owner of the estate disclosed by and at the time of his search.

The view that the provisions of the Act regarding the conclusive character of a certificate of title were such as allowed the purchaser to complete his transaction on the state of title obtaining at the time when he made his search, and in total disregard of the registration of the *lis pendens* was supported by reference to *Cooper* v. *Anderson*.[4] An examination of that case fails to confirm this reading of it. There the property had been bought from a trustee by a company ignorant of the registered owner's fiduciary capacity. The title had been searched and had proved clear save for a mortgage which was not in dispute. While the title was still in the same state the purchaser had registered a caveat based on the contract of sale. This fact constitutes the fundamental difference between the circumstances of the two cases. Later, a *lis pendens* was registered and the plaintiff was seeking to set the sale aside. Robson, J., relied on the rule that registration of a caveat gave priority to its subject matter or the instrument on which it was founded, and held that the caveat protected the purchaser's interest from the inception to the completion of the contract, and accordingly the sale had to stand. In other words, registration of its caveat had given the purchaser company the right to complete its transaction on the state of title existing when the registration was effected, and eventually to get a certificate of title for the beneficial interest disclosed by the register at the date of the caveat's registration; a conclusion the correctness of which is indisputable. It was not held that the company's mere search of the title gave it any such right. But the practical effect of *Bain* v. *Pitfield* is that

[4] 22 M. L. R. 428.

priority of title to an estate is got by searching, provided a transfer is eventually registered, no matter how the estate may have been reduced or modified by intermediate registrations. Such a result is plainly contrary to the express provisions of the Acts and their necessary implications.

Then the section of the Act relieving against notice of an unregistered interest did not apply for two reasons. In the first place the registered instrument which the purchaser was seeking to have removed was a *lis pendens,* and "the doctrine as to the effect of *lis pendens* on the title of an alienee is not founded on any principles of Courts of Equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of a court in a suit should be binding, not only on the litigant parties, but on those who derive title from them, *pendente lite,* whether with notice of the suit or not."[5] The abolition, therefore, by the Acts of the doctrine of constructive notice[6] —and if registration were notice at all, it could only be constructive notice—is entirely without effect in the case of a registered *lis pendens.* That instrument does not derive its force from any principle of notice, but from the necessities of the administration of justice between individual and individual, and the Acts have not removed or modified, either expressly or by implication, any of those necessities beyond imposing the single additional obligation on a plaintiff of registering a *lis pendens* if he intends to make certain that the judgment will bind an alienee. This condition was fulfilled in *Bain* v. *Pitfield,* and full play was thus allowed to the rule of the common law that "he who purchases during the pendency of a suit is bound by the decree which may be made against the person from whom he derived title."[7] Judgment having been obtained against the *cestui que trust,* the registration of the *lis pendens* made the judgment debt an indefeasible charge upon the property with priority over all interests registered after it.[8]

[5] *Bellamy* v. *Sabine,* 1 De G. & J. 566.

[6] Man. 99; Sask. 194; Alta. 135. And see REGISTRATION AND NOTICE, *infra.*

[7] *Bishop of Winchester* v. *Paine,* 11 Ves. 194, 197.

[8] See further as to this: CERTIFICATES OF JUDGMENT AND WRITS OF EXECUTION, *infra.*

Its right to this priority can be established in another way. In Manitoba a *lis pendens* and a caveat can be used indifferently to protect an interest in land.[9] Registration of a caveat gives "the same effect as to priority, to the instrument or subject matter on which the . . . caveat is based, as the registration of any instrument under this Act."[10] Registration of a *lis pendens* must secure like priority for its subject matter. Here the subject matter was the suit and the judgment given in it in favour of the execution creditor making the property liable for the execution debt; for, when a *lis pendens* is registered, it is the suit which is registered as a *lis pendens*.[1] The priority claimed for the judgment debt on the balance of the purchase-money outstanding at the time of its registration was all the decision in *Wilkie* v. *Jellett*[2] permitted, and it should have received that priority accordingly. Notice did not enter into the question at all.

Another reason why the section protecting a purchaser against notice of an unregistered interest did not apply was that registration of the *lis pendens* made it impossible to speak of the execution creditor's interest as an unregistered interest. It was registered by way of *lis pendens* in precisely the same manner as if it had been registered by way of caveat. The expression "registration by way of caveat" has been subjected to criticism, but, as pointed out later,[3] its meaning is unmistakable, denoting registration of an instrument or an interest by means of a caveat based on either, with the result that, a memorial of the instrument or interest having been entered on the register, either consequently becomes part of the register, in short, is itself registered. Had the purchaser searched the title again, as he should have done, before registering his transfer, he would have been obliged to make the same inquiries regarding the interest for which the *lis pendens* stood as he presumably did make in regard to the extent of the mortgagee's interest under the

[9] Man. 153.

[10] Man. 151.

[1] *Wigram* v. *Buckley* (1894), 3 Ch. D. at 485.

[2] *Supra*; and see chapter on that case, *infra*.

[3] See THE CAVEAT.

mortgage which was on the register when he searched the title for the first and only time. No such obligation could have rested on him if the execution debt had been an unregistered interest.

Bain v. *Pitfield* illustrates another matter; that it is essential to apprehend the time at which the register is conclusive evidence of an owner's beneficial interest in his property to the extent that a purchaser can rely on getting title to the beneficial interest which the register records. The question receives its answer at the mouth of the rule that registered instruments have priority according to date of registration and not date of execution.[4] A purchaser who has transacted in reliance on the register, if he is to secure title to the beneficial interest of the owner as recorded in the register when the bargain is closed, must register his transfer, if the sale is for cash, or a caveat if the price is payable in instalments, before any change has been made in the record through the prior registration of another instrument acquired bona fide and for value; for an earlier registered instrument will receive priority over his transfer or caveat if either is registered subsequently, and he will only obtain title for the owner's beneficial interest after allowance has been made for the earlier registered interest. The time of presentation of the purchaser's transfer or caveat for registration is the time of entry of either in the day book.[5] This time is also the time at which, when entered in the register, the transfer or caveat will be deemed to have been registered.[6] No instrument or interest not recorded in the register at that moment is part of the register in reliance on which the purchaser is transacting; and, from that moment, such an instrument or interest is impotent to limit the owner's beneficial interest as then disclosed by the register, since, again from that moment, the transfer or caveat has an absolute priority (fraud excepted) over every unregistered interest, even though alienated by the owner before he executed the transfer or concluded his agreement of sale with the purchaser.

[4] Man. 89; Sask. 63; Alta. 23.
[5] Man. 12; Sask. 25 (2); Alta. 20.
[6] Man. 89; Sask. 25 (2), 26; Alta. 20.

A hypothetical case will illustrate an important consequence of this position. An owner of land fraudulently sells it to two different purchasers. The first purchaser lodges his transfer for registration, but before the registrar has had time to register it the second, having searched the certificate of title and found it clear, in turn hands in his transfer for registration. The first purchaser obtains title of course. But the second purchaser has transacted in reliance on the register, which showed the entire beneficial interest in the property to be in the vendor. He has been invited to treat this evidence as absolutely conclusive, and to deal on it as absolutely reliable and, acting on that invitation, he has paid for the land and so materially altered his position for the worse. Yet he has no remedy save against the vendor. The assurance fund is only available to make good the mistake or misfeasance of a registrar, and there is no mistake or misfeasance here. To be perfectly safe a purchaser must adopt one of two courses. Either he must make it a condition of sale that the vendor is to deliver, not a transfer in the purchaser's favour, but a certificate of title in his name. Or he must register a caveat while the register remains unchanged, and thus secure an indefeasible priority for his purchase. Only by one or other of these means can he make certain of getting title for the beneficial interest which it is his intention to obtain and pay for.

Another consequence of importance is that it is not sufficient merely to commence a transaction on the register. The transaction must be carried through continuously and concluded on the register; another simple and fairly obvious fact, perhaps, when stated in so many words, but one which can be overlooked at times. In order so to conclude a transaction an instrument relating to it must be registered at the moment when a purchaser has assured himself by a search that the register then shows the estate or interest which he proposes to acquire to be in the registered owner. Registration of an instrument confers on it, or the estate or interest for which it stands, an absolute priority, and, in the eyes of the Acts, once this priority has been secured the transac-

tion is, for all practical purposes, completed. What follows is mere formality. Acceptance by a registrar of a valid transfer for registration will give a purchaser an indefeasible right to a certificate of title for the estate or interest purchased as from the date at which the transfer is lodged for registration; while a similar acceptance of a caveat, when the price is payable in instalments, will secure for him the same right as from the date at which the caveat is lodged for registration, subject to the precedent condition that the contract is specifically performed on his side; for a caveat protects the transaction on which it is founded from the time of its registration to the time of its withdrawal or lapsing in the manner prescribed by the Acts.[7]

A third result flowing from the fact that the register is conclusive evidence of an owner's beneficial interest at the time when an instrument affecting it is lodged for registration has to do with with the prevailing practice in regard to certificates of judgment and writs of execution which have been filed in land titles offices. To take a single example. A company which owns a subdivision has sold a number of lots to the same purchaser. The price being payable in instalments there has been the usual agreement of sale to protect which the purchaser has registered a caveat. The purchaser has re-sold the lots singly or in smaller parcels. Transfers of the lots are to be given by the company direct to the sub-purchasers. The original purchaser has a common name, spellable in more than one way, and christian names in very general use. A sub-purchaser receives a transfer and knowing the company and the sub-vendor to be of good standing, lodges the transfer for registration without making any searches. He gets a notice from the land titles office concerned that his transfer is held up until a number of writs of execution or certificates of judgment have been disposed of, these having been filed against persons with the same name, or with names similar to that of the sub-vendor (and caveator). The transferee (or the sub-vendor) in such a case will endeavour to get acknowledgments from the creditors that

[7] *Cooper* v. *Anderson*, *supra*. See further as to this: THE CAVEAT, *infra*.

the sub-vendor is not the debtor. Yet he need not do anything of the kind. He can insist on a certificate of title clear of every writ or certificate of judgment not entered on the company's certificate of title at the moment when his transfer was lodged for registration.[8] None of the writs or certificates are registered instruments. They appear in the execution register but not on the register itself, the company's certificate of title. The lodging of the transfer for registration and its immediate entry in the day book secures for it the right to registration in priority to all instruments or interests not entered on the company's certificate of title at the time recorded in the day-book as the time of receipt of the transfer. True, the sub-purchaser has not concluded his transaction on the register since he did not make a search before presenting his transfer for registration. But, as will be seen later, the rule that, fraud apart, it is registration of an instrument which confers indefeasible title necessarily results in a like title being secured on registration of an instrument which has not been registered pursuant to a transaction on the register.[9] And, in any event, a search of the company's certificate of title would not have disclosed the existence of the certificates of judgment or writs.

Although the indefeasible title created by the Acts is primarily intended for those who transact with a registered owner in reliance on the register and record in it their instruments of grant or charge, yet, by reason of the fact that it is registration of the instrument which secures this unimpeachable title, a person who, without transacting on the register, becomes registered owner of an estate or interest in land must of necessity obtain an indefeasible right to his interest or estate. The Acts make specific provision for certain cases of the kind. An executor or administrator of a deceased owner of land (or of a registered mortgage or encumbrance or lease) can register his grant of probate or administration[10] and thereupon becomes registered owner in his fiduciary capacity of the land or interest of the deceased subject

[8] Except in Saskatchewan.

[9] See next and following paragraphs.

[10] Man. 128; Sask. 141 (1); Alta. 74 (2).

to any trusts or equitable interests by which either was bound in the hands of the deceased.[1] Again, an assignee or trustee for the benefit of creditors can register the assignment and thus become registered owner of the insolvent's real property or his interests therein.[2] Registration of the probate or letters of administration gives the personal representative in the one case and registration of the assignment gives the trustee for creditors in the other an indefeasible right or title to the land or interests therein of the deceased, or of the insolvent respectively, although neither personal representative nor trustee has dealt with the registered owner in reliance on the register. Inquiries into the validity of the title of the deceased or of the insolvent impossible to be opened against either cannot be opened as against the personal representative or the trustee. Interests created by the predecessor in title of the deceased or of the insolvent but unregistered at the time when either beame registered as owner, and which were, in consequence, unenforceable against either, cannot be enforced as against the personal representative or the trustee.

While a property remains in the hands of a personal representative an inquiry into the validity of his appointment may, perhaps, be permissible. But once a transfer (or other instrument) which he has executed has been registered, no such investigation can be made, nor one into the existence of other interests in the same estate created by the representative but unregistered when the transfer was presented for registration. The Acts of Saskatchewan and Alberta are quite explicit on the subject. In those two provinces, notwithstanding the fact that the fiduciary capacity of an executor or administrator is set out in his certificate of title, he is to be deemed, for the purpose of registered dealings with the property of the deceased, the absolute[3] or the absolute and beneficial[4] owner of the property (the latter expression merely stating what is necessarily implicit in the former), provided that, where necessary, the consent of the official

[1] Man. 76, 128; Sask. 142, 144, 146; Alta. 74 (4), 76.
[2] Man. 129; Sask. 147; Alta. 83*a*.
[3] Sask. 146 (1).
[4] Alta. 76.

guardian or an order of court has previously been obtained.[5] This must mean that, given the fulfilment of one or both of these conditions when required by circumstances, anyone who registers a transfer (or other instrument) from a personal representative acquires a completely indefeasible title to the beneficial estate or interest shown by the register to be in him at the time when the transfer is lodged for registration, notwithstanding any infirmity in the title of the deceased owner or in that of his personal representative or the existence of unregistered interests created by either. The proviso that an executor or administrator is to hold a property subject to any trusts and equities affecting it in the hands of the testator or intestate[6] cannot detract from this position. Such trusts and equities are enforceable against the personal representative. But, just as they could not be enforced against anyone dealing with the deceased owner in reliance on the register because they were unregistered—for trusts are excluded from the register, while an equitable interest is the same thing as an unregistered interest—unless such notice of them had been received as to ignore their existence would be equivalent to fraud, so they cannot be enforced against anyone dealing with the deceased owner's executor or administrator; subject, of course, to the same condition.[7] The terms of the Real Property Act of Manitoba are not so ample or clear as those of the Acts of Saskatchewan and Alberta. Under that statute a personal representative who becomes registered as owner of a mortgage or encumbrance has all the rights and powers of the deceased owner.[8] But such is not the fact; for the deceased owner could alienate a mortgage or encumbrance at will, whereas his executor or administrator must obtain the consent of the district registrar concerned before alienating.[9] An executor or administrator is not expressly given the rights and powers which the deceased owner had over his land, but these seem a matter of necessary implication, sub-

[5] Sask. 146 (2).
[6] See note 4, *supra*.
[7] See also Sask. 59; Alta. 42.
[8] Man. 128.
[9] Man. 76.

ject to the express provision that the land is to be held upon the trusts and for the purposes to which it is subject by law, and to the obligation of securing the consent of the proper district registrar to any dealing with it.[10] Consequently in Manitoba a purchaser from the personal representative of a deceased owner may, by reason of this express legislation, have to make a more extended investigation into title and estate than he has to in the other two provinces.

It follows that a devisee under a will or a next-of-kin in an intestacy who receives and registers a transfer from the personal representative of the deceased owner for the property left to or devolving upon him acquires an indefeasible title to the beneficial estate or interest shown by the register to be in the personal representative at the moment when the transfer is lodged for registration, although such a devisee or next-of-kin has not dealt with the registered owner in reliance on the register.

A consideration of the position of a transferee from an assignee or trustee for the benefit of creditors is not really germane to the present discussion because he will or should have transacted on the register. But it is worth noting as an illustration of the sort of title which such an assignee or trustee can pass to a purchaser. In Manitoba and Alberta the fiduciary capacity of an assignee or trustee is not set out in his certificate of title; and for the purpose of all registered dealings with the insolvent's property he is to be deemed the absolute owner of it.[1] Under the Acts of those provinces, therefore, a purchaser from an assignee or trustee for creditors obtains the same indefeasible title as a transferee from the personal representative of a deceased owner obtains under the Act of the latter province (and of Saskatchewan). The only express provisions on the subject in the Land Titles Act of Saskatchewan, besides that enabling an assignee to register the assignment, prohibits a registrar from registering any instrument executed by the debtor.[2]

The Acts are silent regarding a voluntary transfer. But the relief which they afford from all obligation to investigate

[10] *Ibid.*

[1] Man. 129; Alta. 83*a*.

[2] Sask. 147 (2).

the validity of a title and the disability which they impose on an unregistered instrument in the matter of passing an estate or interest are expressly stated to be intended for three classes of individuals, namely, those "contracting or dealing with," those "taking," and those "proposing to take" an instrument from a registered owner.[3] A donee of a free gift of land *inter vivos* certainly falls within the second of these categories, and may also fall within the third when he knows of and intends to accept the gift. Once his transfer has been registered, therefore, his title is not impeachable for any defect in the donor's title, nor by reason of the existence of any unregistered interest created by the donor before or after making the gift, if the donee has not received such notice of the creation of the interest which would make his disregard of it equivalent to fraud. Before the Acts were passed a voluntary conveyance was deemed to be fraudulent simply because it was voluntary, and although there might have been no fraudulent intent on the part of the donor.[4] This view was ultimately repudiated in England by legislative enactment several years ago,[5] and has never been possible here when registered land has been in question for two reasons. First, because the fraud was presumed or constructive, and secondly, because it was in the donor only. For there to be fraud in a voluntary transfer of registered land the fraud must be actual and common to donor and donee.[6] In the absence of actual fraud, therefore, to which he has been privy, a volunteer gets the same indefeasible title to the land given him as a purchaser gets to the land which he has bought after dealing in reliance on the register.

An execution creditor who makes no profession of transacting in reliance on the register may often obtain as security for his debt the estate or interest which would have been

[3] Man. 99; Sask. 194; Alta. 135.

[4] 13 Eliz. c. 5; 27 Eliz. c. 4; Hals. XV., pp. 93 and 95.

[5] Voluntary Conveyances Act, 1893.

[6] *Assets Co. Ltd.* v. *Mere Roihi* (1905), A. C. 176. This case was on the Land Transfer Act of New Zealand, but a comparison of the sections to which reference was made in the judgment with the corresponding sections of the Canadian Acts indicates that this description of fraud fully applies here. See also Man. 79; Sask. 174; Alta. 44.

liable in satisfaction of it had he first searched the title like a mortgagee. In any event, however, directly a certificate of judgment or writ of execution has been entered on the debtor's certificate of title, the debt becomes a registered charge with priority from the date of its registration and the title to it, like that to any registered interest, is indefeasible save for fraud.[7]

Lastly, persons are to be found sufficiently confiding, or so careless or ignorant, as to rely not on the register but on the representations of owners. Nonetheless, such a one will secure an indefeasible title to the beneficial estate which he expects to get should his registered estate or interest prove to be that which the owner represented his as being.

Thus far of a person dealing with a registered owner, an understanding of whose position comes first in order of importance since most of the land in the three Western provinces is held by Torrens title. But as common law title is still to be met with, and is in process of gradual extinction through the bringing of land under the Acts, the case of *Assets Co. Ltd.* v. *Mere Roihi*,[8] calls for notice because it was there decided that a certificate of ownership is conclusive evidence of the title of the first registered owner. The defendant company had brought certain of the properties in dispute under the Land Transfer Act of New Zealand, and its registered title was impeached on two grounds, one of fraud, the other of the invalidity of the deeds or orders of court on the strength of which the registered titles had been issued. The charge of fraud was dismissed, but it was found that the irregularities which were alleged to have vitiated the company's original deeds or orders had occurred, and it accordingly became necessary to ascertain the legal effect of registration of title under the Land Transfer Acts in order to decide on the company's claim that registration gave it a good title notwithstanding the irregularities. The history of a good deal of legislation was reviewed, but it is unnecessary to do more than note the provisions common to the acts of New Zealand and to those of this country. All the acts

[7] See further CERTIFICATES OF JUDGMENT AND WRITS OF EXECUTION, *infra*.

[8] (1905) A. C. 176.

make a certificate of title (or ownership) conclusive evidence that the registered owner is entitled to the estate specified;[9] all enact that his title cannot be impeached save for fraud or by a registered owner claiming under a prior certificate;[10] all limit in the same way the right to bring an action for recovery of land against a registered owner.[1] All provide, also, that a certificate of title cannot be invalidated on account of any informality in the application or proceedings pursuant thereto;[2] but the New Zealand Act goes further and makes a certificate of title conclusive evidence that the property to which it relates has been duly brought under the Act.[3] It was said that, "in dealing with actions between private individuals, their lordships are unable to draw any distinction between the first registered owner and any other . . . the sections making registered certificates conclusive evidence of title are too clear to be got over. . . . Their lordships base their judgment on the conclusiveness of the registered title in the absence of fraud."[4] The defendant company's certificates of ownership were accordingly held conclusive evidence of their title notwithstanding the precedent irregularities in certain proceedings and the title itself to be indefeasible.

None of the Western Canadian Acts expressly make a certificate of title conclusive evidence that the property described in it has been duly brought under the acts. But notwithstanding this omission their other provisions regarding the conclusive effect of a certificate are sufficiently emphatic to render that result implicit in them. Consequently it can be said of these Acts with as much truth as of the Land Transfer Act of New Zealand that the sections making registered certificates conclusive evidence of title are "too clear to be got over" in the case of a first registered owner as well as in the case of a purchaser from such an owner.

Thus, although it is impossible to give its ordinary mean-

[9] N. Z. 65; Man. 79; Sask. 174; Alta. 44.
[10] N. Z. 56; Man. 79; Sask. 59; Alta. 42.
[1] N. Z. 56; Man. 84; Sask. 159; Alta. 104.
[2] N. Z. 66; Man. 164; Sask. 206; Alta. 142.
[3] N. Z. 65.
[4] (1905), A. C. at 202 and 212.

ing to the term conclusive evidence when applied to the existence and identity of a registered owner or to the area, boundaries and situation of his land, yet that expression can receive its ordinary meaning when used in speaking of a registered owner's title to his property or of his estate or interest therein. Indeed it is imperative that it should receive that meaning in regard to those two matters if the very purpose for which the Acts exist is not to be frustrated.

Their principal and expressed object is to give certainty to the title to estates in land and to make the proof of title easier. The necessity for examining the history of a title in order to be assured of its validity and of the parties interested in the property had made the verification of title and estate a somewhat laborious proceeding. This necessity is removed by the creation of an official register of titles to estates and interests in land styled, shortly, the register. After land has been brought under the Acts a certificate of title for it is made out; and regarded as a whole, the register consists of the last certificates of title for the lands which have been registered under the Acts, while, in relation to a particular property, it consists of the last certificate of title for that property. Whatever the facts this register is to be acted on as if it were the complete and conclusive record of the title to any particular land and of the registered owner's beneficial interest therein. No one transacting in reliance on the register need go behind it in order to test the validity of a title; nor need he go outside of it in order to ascertain who, besides the registered owner, has any interest in the property.[5] As against him courts of law and equity are deprived in the most explicit terms of all jurisdiction either to open an inquiry into a title's history, save in case of fraud, and where an earlier certificate of title is in existence, or to admit evidence of the interest of a party who has not recorded the interest in some form on the register, fraud excepted. Everyone who, after dealing on the faith of the register, enters in it an instrument evidencing the estate or interest which has been the subject of his transaction, acquires an indefeasible title or right of some sort (as in the case of a

[5] Except in Saskatchewan for execution creditors.

caveator) to that estate or interest, if it is shown by the register to be in the registered owner at the moment when the instrument is presented for registration, free from all estates and interests not then recorded on the register, including certificates of judgment and writs of execution which have merely been filed and consequently are not part of the register.[6] This indefeasible title is got, not by transacting in reliance on the register at the initiation of the bargain, but throughout right up to its conclusion, which, in the eye of the Acts, lies in the registration of an instrument by the person transacting. Although this indefeasible title is primarily intended for those who deal on the faith of the register yet it is also secured by many who do not. The Acts make explicit provision for the cases of the personal representative of a deceased owner and an assignee for the benefit of creditors. But a devisee under a will and a next-of-kin in an intestacy, neither of whom has transacted in reliance on the register, obtain each an indefeasible title to such property as may have been transferred to him by the executor or administrator. A volunteer gets an indefeasible title to the land donated to him. A judgment or execution creditor secures like title for his registered charge. Even one who, though dealing with a registered owner, ignores the register altogether, is assured of an unimpeachable title to the interest transferred or created if this appears from the register to be in the owner when the transfer or other instrument is presented for registration.

[6] Except in Saskatchewan.

CHATPTER IV.

Wilkie v. *Jellett*.[1]

Wilkie v. *Jellett* is the leading case on the Acts, for it laid down principles which have governed courts and daily practice ever since. The facts were few and simple. Purchasers of land had ignored the provision of the Real Property Act of the North-West Territories[2] by virtue of which their agreements of sale would not pass their interests in the lands purchased as against a later acquired interest which might be registered while theirs remained unregistered and had neglected to protect themselves against the possible consequences of this provision by registering caveats. After they had completed their bargain and received a transfer (which did not include one of the purchasers who was to get a separate transfer) they had persisted in their original negligence and had not registered the transfer as soon as they got it. Meanwhile a judgment creditor of the vendor, unaware of the sales and having discovered that the vendor was the registered owner of the lands sold, had registered a writ of execution against the titles. Later, the transferees registered their transfer and a certificate of title was issued to them with the writ endorsed on it. They brought the action to have the registration of the writ cancelled on the grounds that they had acquired the full equitable and beneficial estate in the lands, the registered owner being left with the bare legal title only; and no greater effect was given by the Act to a writ of execution (by which was meant a registered writ) than it had before the Act was passed when it could only attach upon an execution debtor's interest in his property (by which was meant his actual beneficial interest after allowing for the interests, equitable as well as legal, of all other parties not execution creditors). The execution creditor, on his part, relied on the conclusive character of a certi-

[1] 2 Terr. L. R. 133; 26 S. C. R. 282.

[2] R. S. C. 1886, c. 51, s. 59.

ficate of title and the rule against an unregistered instrument passing an estate or interest in land.

"The question of law to be decided," said Maguire, J., "is simply this: Is an execution against lands duly delivered to the registrar binding as against a prior but unregistered transfer to a bona fide purchaser?"[3] That was not an adequate nor even a correct statement of the issue. The writ had not only been duly delivered to the registrar, but had also been duly registered; and the transfer had been registered too. The plaintiffs were suitors in a court of equity for relief against the express provisions of a statute. One enacted that a certificate of title was to be conclusive evidence of a registered owner's (beneficial) estate or interest in the property described in the certificate at the time of registration of an instrument on it;[4] at the time of registration of the writ the certificate of title showed the full legal and beneficial estate to be in the execution debtor (and vendor). Another provision declared that, until registered, an instrument could not pass an interest or estate in land;[5] the plaintiffs' transfer was still unregistered at the date of registration of the writ. A third directed that registered instruments were to have priority according to date of registration and not of execution;[6] the transfer had been registered after the writ. The plaintiffs were asking for relief against each of these rules. The questions of law were, first, had the court any jurisdiction to grant the relief prayed; and, secondly, if it had, were the plaintiffs entitled to that relief? And of these two questions in their order.

Relief against an express statutory enactment is never or rarely granted by a court of equity; for the "principle of equitable construction has . . . fallen into discredit . . . and may now be considered as altogether discarded as regards the construction of most modern statutes."[7] Consequently "the High Court at the present day declines to interfere for the assistance of persons who seek its aid to relieve them

[3] At p. 140.
[4] Section 62.
[5] Section 59.
[6] Section 41.
[7] Maxwell *Interpretation of Statutes* (5th ed.), p. 420.

against express statutory provisions."[8] The reason is that modern acts are framed with a view to equity as well as law.[9] The reason applied here. A certificate of title had expressly been made conclusive evidence against a court of equity of a registered owner's beneficial estate save in given circumstances which did not obtain in this case.[10] With equal explicitness an unregistered instrument had been rendered incapable of passing an estate or interest in land, even when its existence was known to the person concerned (fraud apart), any rule of equity to the contrary notwithstanding.[1] Registered instruments had been given priority according to time of registration,[2] and the priority of a registered instrument is conclusive against a court of equity. To take the case of a registered charge such as a mortgage. The mortgage is a limitation on the registered owner's beneficial interest in his property. A certificate of title is always conclusive evidence for a person dealing in reliance on it, and against a court of equity, of that interest, either as unlimited by registered interests carved out of or charged upon it, or as limited to the extent only to which such interests may have been registered against it. A certificate of title, therefore, is also conclusive evidence, in favour of the individual transacting and against a court of equity, of the registered limitations (or interests) by which the original beneficial interest of a registered owner has been reduced. It is also conclusive evidence in favour of the person transacting and against a court of equity, of the dates upon which the reductions were respectively made, that is to say, of the respective priorities of the registered interests. For, if the registered owner of a mortgage proposes to sell it, the certificate of title, again because it is conclusive evidence in favour of the person transacting and against a court of equity of a registered owner's beneficial interest in land, is also conclusive evidence in favour of the purchaser of the mortgage

[8] Craies *Statute Law* (4th ed.), p. 73.

[9] *Ibid.*, pp. 73, 74; *Edwards* v. *Edwards* (1876), 2 Ch. D., Mellish, L.J., at p. 297.

[10] Section 62.

[1] Section 126.

[2] Section 41.

and against a court of equity, of the beneficial interest of the registered owner of the mortgaged land available to the registered owner of the mortgage in satisfaction of the mortgage debt, and of the ranking of the mortgage on that beneficial interest, that is to say, its priority as a first, second or later charge. The priority of a mortgage is the prime test of the beneficial interest of the mortgagee, the registered owner of the mortgage, in the land. But it is not the only test. A mortgage is registered for what it may be worth; its registration is no proof that the mortgage money has been advanced; and it is a well-known fact that mortgage companies insist on registration of a mortgage as a condition precedent to the making of an advance. The only jurisdiction open to a court of equity, apart from fraud, is to admit an inquiry into the fact of an advance or of its repayment. It cannot disturb a registered priority save for fraud and want of consideration. And so with any registered charge on land.

Although these provisions were primarily intended for the benefit of persons transacting with registered owners in reliance on their certificates of title—the register[3]—yet the Act itself expressly enabled others who had not so transacted to reap the same benefit:[4] and because registration confers indefeasible title the provisions worked, of necessity, to the advantage of those who might refrain, whether through indifference or deliberately, from examining the register.[5] For the same reason they worked, of necessity, to the advantage of an execution creditor, who is not obliged to transact on the register and who makes no profession of doing so. The act in force at the time of *Wilkie* v. *Jellett* did not allow an execution creditor to lodge a writ in a land titles office unless he could point to land belonging to the debtor;[6] and a writ, when lodged, was immediately registered on the certificate of title for the land. It then bound the land and any transfer of the land was subject to the writ.[7] These provisions made the execution debt a registered charge upon the land for the

[3] See previous chapter.
[4] Executors and administrators; s. 91.
[5] See previous chapter.
[6] Section 94.
[7] Section 94.

purpose of enabling the execution creditor to recover his debt out of the land with priority from the date of registration of the writ. An execution creditor thus became the registered owner of an interest in the land bound and his position as such was exactly the same as that of an encumbrancee or mortgagee.[8] The debtor's certificate of title was conclusive evidence against a court of equity of the execution creditor's title to a charge for the amount of the judgment debt upon the beneficial estate of the debtor as shown by his certificate of title at the time of registration of the writ and of the priority of the charge; subject, of course, to the right of the court to admit evidence that the debt had been paid though the memorial of the registration of the writ still stood. Consequently, notwithstanding the fact that the execution creditor had not transacted in reliance on the register his registered title to a charge for the amount of his judgment on the beneficial interest of the execution debtor as disclosed by the debtor's certificate of title at the time of registration of the writ could as little be defeated by a court of equity as such a court could defeat the title of the debtor (and vendor) himself to that beneficial interest.

The fact that a writ, when registered, was to operate as a caveat as well as to bind the land,[9] neither added to nor detracted from its effect as a registered charge save in one or two particulars which are not in point here. Anticipating conclusions already referred to[10] and stated later,[1] it may be said, shortly, that, since registration of an instrument confers indefeasible title to a right of some sort with priority from the date of registration, registration of a caveat confers an indefeasible right to prove the validity of the interest claimed, if challenged, with priority for the interest, if valid, from the date of the caveat's registration. As a registered charge the debt already had priority as of the time of registration of the writ and the execution creditor, as registered owner of the charge, already had indefeasible title to it unless it could be shown that the debt had been paid.

[8] Section 3 (*d*) and (*g*); and see further: CERTIFICATES OF JUDGMENT AND WRITS OF EXECUTION, *infra*.

[9] Section 94.

[10] See previous chapter.

[1] See THE CAVEAT, *infra*.

The first question, as to the competence of a court of equity to grant the relief prayed, had, therefore, to be answered in the negative. Consequently there was no need to consider the second—whether the plaintiffs were entitled to relief.

What, then, were the reasons for holding to the contrary?

1. It was said that "One must not forget, however, that the Act is largely framed for the guidance of registrars,"[2] and "the apparently general words of section 59 (that an unregistered instrument could not pass an estate or interest), and 62 (making the certificate of title conclusive evidence), may be given effect to as being addressed to the registrar, and to be observed by him so far as he is concerned in the performance of his duties."[3] There need not be any hesitation in saying that this view was mistaken. *Gibbs* v. *Messer*[4] had already decided four years earlier that these sections were addressed, not to registrars, but to all persons who might become involved in transactions in land; and constituted an invitation to them to treat a certificate of title as conclusive evidence of title and estate behind which they need not inquire into a title's history, and outside of which they need not go in order to ascertain who were interested in a property. But they were also addressed, with others, to courts of equity; and prohibited them from enforcing an unregistered interest as against an interest which had been registered without fraud.[5]

2. It was said, again, that the Act provided for a person without any beneficial interest becoming registered as owner, as, for instance, the personal representative of a deceased owner, who, when registered, was to be "deemed the owner"; and it was asked whether the conclusive character of a certificate of title rendered a court of equity powerless to grant an injunction to prevent such a personal representative from

[2] *Wilkie* v. *Jellett*, 2 Terr. L. R. at 143.

[3] *Willkie* v. *Jellett*, 2 Terr. L. R. at 145.

[4] *Supra.*

[5] Section 126 of the Territories' Act corresponds to the sections in the present Acts rendering it unnecessary for a person dealing with a registered owner from inquiring into how he became such, etc.

improperly dealing with the land, or to restrain an execution creditor of the personal representative from selling it. A negative reply was given to both questions, because it was considered that notwithstanding the plain words of the Act, they did not prevent a court of equity from interfering in such circumstances. It is inconceivable that the occasions contemplated could arise. The certificate of title of an executor or administrator, then as now, set out his fiduciary capacity,[6] and was thus conclusive evidence that the land described in it was not his personal property. By no possibility could an execution creditor of an executor or administrator attach and sell the land.

3. It was pointed out that while section fifty-nine declared in general terms that an unregistered instrument was to be incapable of passing an estate or interest in land, section sixty-four particularized and rendered such an instrument incapable of passing an estate or interest as against a bona fide transferee; thus leaving it to be inferred that an instrument which had not been registered might be good against persons who were not bona fide transferees. In other words, the express mention of bona fide transferees as the class of persons against whom an unregistered instrument was to be ineffectual excluded those who were not within the class specified; *expressio unius exclusio alterius.* Of this rule Wills, J., said in *Colquhoun* v. *Brooks*:[7] "I may observe that the method of construction summarized in the maxim 'expressio unius exclusio alterius' is one that certainly requires to be watched . . . the failure to make the expressio complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind." Whatever the reason, the "expressio" in section sixty-four clearly was incomplete, for it did not mention a bona fide mortgagee, or lessee, or encumbrancee, nor did it refer generally to the category within which these and other persons were included and which was specifically mentioned

[6] Section 91.

[7] (1887), 19 Q. B. D. at 406.

in section one hundred and twenty-six,[8] namely, those who dealt with a registered owner. Referring to the remarks of Mr. Justice Willis, Lopes, L.J., said in the court of appeal: "The maxim 'expressio unius exclusio alterius' has been pressed upon us. I agree with what is said in the court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, lends to inconsistency or injustice."[9] It has been seen that a necessary consequence of the guarantee by the Acts of indefeasible title to persons who transact in reliance on the register, and who register their instruments of grant or charge, is that the same indefeasible title is guaranteed to those who register similar instruments though these have not been obtained as the result of a transaction on the faith of the register.[10] To hold, as was done in *Wilkie* v. *Jellett*, that an execution creditor who has registered his writ of execution against the title to a particular property of the debtor could not secure indefeasible title for this registered charge because he was not a bona fide transferee, and so not within the category of persons mentioned in section sixty-four as those against whom an unregistered instrument was ineffectual, was clearly an application of the maxim which lent to inconsistency in construction, since it must defeat the scheme of guaranteed title by registration which the Act established.

4. It was said, again, that if section sixty-two, which made a certificate of title conclusive evidence, were as absolute as the execution creditor contended there would be no need for section one hundred and twenty-six, which relieved anyone dealing with a registered owner from inquiring how he became such, and into the existence of interests created or arising since he received his certificate of title, but which did

[8] Which enacted that those dealing with a registered owner were not affected by unregistered instruments, that is, as already observed, such instruments could not pass an estate or interest as against them.

[9] (1888), 21 Q. B. D. at 65.

[10] *Supra*, previous chapter.

not appear in the register. It is possible, of course, that the latter section was not essential in order to make the intention of the Act clear, and that section sixty-two, with section fifty-nine (rendering an unregistered instrument incapable of passing an estate or interest in land), would have proved an adequate statement of the Act's main object. But, however that may be, the fact was that the legislature had added section one hundred and twenty-six, and had thereby placed its intentions beyond dispute. It had in view, first and foremost, the interests of persons dealing directly and immediately with owners of real property with the object of acquiring interests in such property. But the position of others who had not so dealt had also been kept in mind. The personal representative of a deceased owner, it has been seen, acquired indefeasible title, as does a devisee under a will or pursuant to an intestacy, and even the donee of a free gift; all because registration, in the absence of fraud, confers indefeasible title.[1] Section one hundred and twenty-six did not constitute an addition to the conclusive character of a certificate of title nor create any exception to the principle of indefeasible title by registration. The fact, therefore, that the execution creditor was not within the category of persons transacting in reliance on the register was no proof at all that his registered title could be defeated.

5. The court seems to have rested great reliance on section one hundred and thirty. This was a saving clause and ran: "Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud or over contracts for the sale or other dispositions of land." The saving of jurisdiction in fraud was superfluous because this had already been preserved by sections sixty-two and ninety-four, and also because no statute can be made the instrument of fraud; so that the only effective part of the clause was that relating to the jurisdiction over contracts and other dealings with land. To such transactions a registered owner of land, or some interest in land, was a necessary party and, as regards them, one intention may have been that nothing in the Act should prevent their

[1] *Supra*, previous chapter.

enforcement, either against registered owners and in favour of the other parties to them and *vice versa*, or their setting aside by parties who might be interested in having that done; which would preserve jurisdiction in specific performance, breach, mistake and all the rest. The section is practically identical with section one hundred and twenty-six of the Real Property Act of Manitoba as that act stood in 1910, and it was pointed out by Cameron, J., in *Williams* v. *Box*,[2] that the latter section was a reproduction of the first sentence of section 249 of the Real Property Act, 1886, of South Australia,[3] which reads: "Nothing contained in this Act shall affect the jurisdiction of the courts of law and equity in cases of actual fraud, or over contracts or agreements for the sale or disposition of land or over equities generally." The learned judge continued: "The full intention of the Australian legislature in passing the declaratory portion of the section is explained by what follows."[4] What followed was this: "And the intention of this Act is that notwithstanding the provisions herein contained for preventing the particulars of any trusts from being entered in the register-book, and without prejudice to the powers of disposition or other powers conferred by this Act on proprietors of land, all contracts and other rights arising from unregistered transactions may be enforced against such proprietors in respect of their estate and interest therein, in the same manner as such contracts or rights may be enforced against proprietors in respect of land not under the provisions of this Act." That is to say, the intention was to preserve the powers of the courts to enforce contracts affecting land against registered owners and not to allow registered owners to set up in their own favour and against purchasers and the like the conclusive character of their certificates of title, and so avoid performance of contracts which had not been recorded on their certificates by means of caveats. Regarding this avowed purpose, Cameron, J., observed: "The intention of the Manitoba legislature, although not expressed in words, must have

[2] 19 M. L. R. at 584.

[3] *Hogg*, p. 396. It is also to be found in the other Australian Torrens Statutes.

[4] 19 M. L. R. at 584.

been the same."[5] It was left to be gathered, as it could be gathered, from the rest of the Act. The observation holds good of the intention behind section one hundred and thirty of the Real Property Act of the Territories taken, as it must have been, from the South Australian or one of the other Torrens acts of Australia.

But section 249 of the Act of South Australia had an important proviso: "Provided that no unregistered estate, interest, contract or agreement shall prevail against the title of any bona fide subsequent transferee, mortgagee, lessee or encumbrancee for valuable consideration duly registered under this Act." That is to say, the section was not intended to authorize a court of law or equity to enable an unregistered instrument to pass an estate or interest against a registered estate or interest. The proviso was omitted from the Act of the Territories (as it also had been from that of Manitoba), and an adequate explanation of the omission was that sections fifty-nine, sixty-two and one hundred and twenty-six rendered it unnecessary since the combined effect of those sections was to deprive a court of equity of all power to enforce an unregistered interest as against one registered, except in cases of fraud. The execution creditor was an encumbrancee for valuable consideration, his transaction had been a bona fide one, and his title duly registered in the manner prescribed by the Act. Section one hundred and thirty, therefore, gave a court of equity no jurisdiction whatever to defeat that registered title.

Even if all reference to the proviso were omitted, and section one hundred and thirty were considered solely in relation to the statute of which it was a part, the result would still be the same; for the conflict between it and sections sixty-two (making a certificate of title conclusive evidence), fifty-nine (rendering an unregistered instrument incapable of passing an estate or interest in land), and one hundred and twenty-six (relieving from inquiry into a title's history and against notice), which, as has been seen,[6] together formed a single enactment constituting the foundation of the Act,

[5] *Ibid.*

[6] *Supra*, previous chapter.

and deprived a court of equity of jurisdiction to open an inquiry into a title's history or enforce an unregistered interest against one which had been registered, became a conflict between a general and a special enactment in the same statute; and *generalia specialibus non derogant.* The rule is that where, in the same or a subsequent statute, a particular enactment is followed by a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.[7] *Exp. Payne*[8] is a very apposite illustration of the rule. An act of George IV. compelled a friendly society to provide in its regulations for the settlement of every dispute between the society and a member by the county justices or arbitrators, and made all findings by the justices or arbitrators final, without appeal, and not removable into a court of law or restrainable by a court of equity; in other words, made the findings conclusive both at law and in equity. The County Courts Act of 1846 gave such courts jurisdiction in "all pleas of personal actions where the debt or damage claimed is not more than twenty pounds." A member of a building society, having withdrawn from it, brought an action in the county court for the amount of his share which was less than £20. It was held that the later general enactment enabling a county court to entertain any personal action in which the claim did not exceed a given sum could not override the earlier special enactment expressly depriving every court of law and equity of jurisdiction in a dispute between a member of a building society and the society. In the same way the special enactment in the Real Property Act of the Territories depriving a court of equity of all power to defeat the title for a duly registered interest (save for fraud) was not to be overriden by the later general enactment giving such a court jurisdiction over contracts for the sale or other disposition of land. For, taken in its most comprehensive sense of enabling a court of equity to enforce such a contract,

[7] Romilly, M.R., *Pretty* v. *Solly*, 26 Beav. at 610; Hals., XXII., p. 169; *Taylor* v. *Oldham Corpn.* (1876), 4 Ch. D. 395.

[8] (1849), 18 L. J. Q. B. 197.

when unregistered, against the registered owner of an interest in the land sold other than the vendor—the construction placed on the section in *Wilkie* v. *Jellett*—it would completely overrule the earlier sections which took away from such a court all jurisdiction (save in fraud) to enforce an unregistered interest against one registered. Section one hundred and thirty had to be taken to affect what other parts of the statute to which it was properly applicable. One appropriate application was the provision which gave a court of equity jurisdiction in fraud, for it would be clear dishonesty in a registered owner to attempt to repudiate a contract, when unregistered, on the plea that his certificate of title was conclusive evidence that he had not parted with the interest claimed.

The correctness of these views is illustrated by what happened in Manitoba after the supreme court of the Dominion had reversed the decision of the Manitoba court of appeal in *Williams* v. *Box*,[9] a case concerned with the competence of a court of equity to reopen a foreclosure under the Real Property Act. Mathers, C.J.K.B., had held in the court of first instance that although, apart from the Act, the reason advanced for reopening the foreclosure was a valid one, yet the conclusive character given by the Act to the mortgagee's certificate of title, in other words, the indefeasible title which, in the absence of fraud, the Act guaranteed to him, was guaranteed in terms so clear as to exclude the court's jurisdiction; a finding confirmed by the provincial court of appeal. The supreme court of the Dominion reversed the decision, in part and mainly, on account of section one hundred and twenty-six of the Real Property Act, which, save for some verbal additions which hardly widened its effect, was identical with section one hundred and thirty of the Act of the Territories. The legislature took the first opportunity of repealing the section. It was just as though the legislature had said: "We had thought that our intention to confer indefeasible title upon a registered owner who had got on to the register without fraud had been so clearly expressed in the words depriving a court of law or equity of any jurisdiction to

[9] 44 S. C. R. 1; 19 M. L. R. 560.

defeat his title except for fraud, that it was impossible to construe our saving of the jurisdiction of a competent court to deal with questions regarding agreements of sale, mortgages, and equitable rights as an intention to save a court of equity's jurisdiction to defeat a registered title on any other grounds than fraud. It appears that we are mistaken. We do not intend a registered title to be defeated except on the ground of fraud, or where there is another certificate of title for the same estate or interest in existence. Accordingly we repeal the section." [10]

The case of *Barnes* v. *Baird*,[1] which was referred to in *Williams* v. *Box*, contained circumstances completely differentiating it from the latter case, and which brought it within the scope of section one hundred and twenty-six. A mortgage had been foreclosed and a certificate of title issued to the mortgagee after which his agent, who had a sufficient authority to do so, entered into an agreement with the mortgagor by which she was to pay a sum equal to the former mortgage debt and so recover the property. Under this agreement the mortgagor was let into possession and made several payments on account of the debt. Then, for some unexplained reason, the mortgagee sued for possession of the land and mesne profits and, in reply to a defence setting up the agreement, which had not been registered by means of a caveat, pleaded the conclusiveness of his certificate of title. Here was the very kind of case which had been contemplated by section one hundred and twenty-six. A registered owner was attempting to take advantage of the evidential finality given to his certificate of title to repudiate a contract for the disposal of his property, a contract which, it is true, was unregistered, but was being sought to be enforced against him, and not against a third party with a registered interest.

[10] Leave to appeal to the Privy Council was refused. The fact is no indication, however, that the judgment was approved. Leave is not readily granted when an appeal has first been made to the Supreme Court at Ottawa; nor was the sum involved large. Then the section had apparently been repealed before the question of leave had been considered, the repeal having been passed in March and leave refused in July, and the point raised was no longer of general interest.

[1] 15 M. L. R. 162.

It would really seem that although the agreement was apparently expressed in terms of the law of mortgage and was considered in those terms in the judgment, the transaction was, in actual fact, an entirely new disposal of the property in the form of a contract of sale for a purchase price equal to the amount of the former mortgage debt, and not in any legal sense an agreement for redemption. The former mortgagee had ceased to be such and had become registered owner of the property with a conclusive title, save in case of fraud or when its conclusiveness was sought to be made use of to repudiate a contract which did not appear on it in the form of a suitable memorial of registration, which, after all is a fraudulent proceeding. Be that as it may, the circumstances of the case were such as clearly gave a court of equity jurisdiction to enforce the agreement, though unregistered, against the former mortgagee by virtue of section one hundred and twenty-six.

6. *Morton* v. *Cowan*,[2] a case decided under the Companies Act of Ontario, was cited as an authority directly in point. Section 52 of the act[3] made a transfer of stock invalid for any purpose whatsoever (save as exhibiting the rights of the parties or when made under an order of court), unless entered in the books of the company. A shareholder had transferred his shares but the transferee had not registered the transfer. An execution creditor of the transferor took out a writ of *fi. fa.* under which the shares were sold, and the transferee sought to have the sale set aside on the ground that, although he had not registered the transfer, the equitable and beneficial interest in the shares had nonetheless passed to him. It was held that the transferor had no beneficial interest in the shares at the time of the sale, which was accordingly invalid; the transfer being effectual to indicate the respective rights of the transferor and transferee, and showing that the beneficial interest in the shares had passed to the latter; and, the rule as to sales by the act of the law being that what is sold is the extent of the debtor's interest in the property sold, there was no interest of the debtor to

[2] 25 O. R. 529.

[3] See now R. S. O. 1914, c. 178, s. 60.

sell. The case was not an authority for the simple reason that while, under the rule of law applied, the debtor's beneficial interest was such as he might retain after allowing for all trusts and equities to which his property had become subject,[4] the Real Property Act of the Territories had made the beneficial interest of a registered owner of land to consist in his interest as disclosed by the register; that is to say, his original interest as limited by the interests of others entered on the register. The plaintiffs' transfer had not been registered at the time of registration of the writ. Consequently the writ attached on such interest as the execution debtor's certificate of title showed him to have unaffected by the equitable but unregistered interest of the plaintiffs.

7. It was pointed out that a registered writ of execution was to operate as a caveat against the transfer by the owner of the land, and then it was asked: "But can a vendor in such a case as the present be said to be the owner?"[5] It was held that he could not because the purchasers had become the owners in equity. The question shows the same failure to grasp the real object of the Act as was displayed in the view that the section giving to a certificate of title its conclusive character was addressed to registrars. Before anyone dealing with a registered owner in reliance on the register he was conclusively the owner of the estate shown by the register,[6] though in the eye of a court of equity he might have ceased to be such. This was also his position before all persons who, though not dealing with him on the faith of his registered title, yet duly registered their instruments of grant or charge. And his position was the same before those whom the Act placed in the situation of persons transacting on the register of whom an execution creditor with a duly registered writ was one.[7]

8. It was said that *National Bank of Australasia* v. *Morrow*[8] was a case in point. The citation was not a happy one,

[4] *Whitworth* v. *Gaugrain* (1842), 3 Ha. 415; *Eyre* v. *M'Dowall* (1861), 9 H. L. C. 618.

[5] At p. 148.

[6] *Supra*, previous chapter.

[7] See previous chapter and CERTIFICATES OF JUDGMENT AND WRITS OF EXECUTION, *infra*.

[8] 13 Vict. L. R. 2.

because, as the court remarked, it was asked to give an opinion on a state of facts which were not the facts before it. Consequently the judgment was rather in the nature of a *obiter dictum* than a positive decision. Then the case was concerned with two unregistered instruments, the earlier one being an unregistered and so equitable mortgage, the later an unregistered transfer from a sheriff after a sale in execution; and the point to be decided was, in the words of the court, "whether a purchaser from the sheriff for value and without notice under an execution issued on a judgment of the Supreme Court, when all the requirements of the 106th section of Act. No. 301 have been complied with is or is not affected by an unregistered security." The question was answered in the affirmative, because "the purchaser from the sheriff in fact only buys a charge upon the judgment debtor's interest in the land, and that charge is clearly subject to any earlier equitable or legal charge." However true that may be of the Act of Victoria, and its correctness has been questioned,[9] it had no application at all to the Act of the Territories. Once his writ was registered in the manner prescribed by the Act an execution creditor stood in exactly the same position as an encumbrancee with a registered encumbrance. He had an indefeasible registered security. A sheriff's sale was a proceeding analogous to a sale under a mortgage or encumbrance, and the provisions of the Act which required confirmation of the sale by the court and certain notices were designed to afford an execution debtor a protection similar to that extended to a mortgagor. Consequently what a purchaser bought at a sheriff's sale under the Real Property Act of the Territories, and what he buys today under all the present Acts, is not a charge on the execution debtor's beneficial estate after allowing for all prior equitable interests, but his beneficial estate or interest as shown by the register at the time of the registration of the writ, that is, the debtor's estate or interest in the land subject only to such interests as may have been registered prior to the registration of the writ of execution. It was held in the Dominion court of appeal that the object of section 106 of

[9] See Mr. Hogg's article referred to *infra*.

the Act of Victoria and of section 94 of the Act of the Territories, each providing for registration of writs of execution, was, "not to give the execution creditor any superiority of title over prior unregistered transferees, but merely to protect the land against intermediate sales and dispositions by the execution debtor."[10] It is a commonplace of the interpretative construction of statutes that an act of parliament has to be construed as a whole. Section ninety-four has, therefore, to be read in conjunction with the general purpose of the Real Property Act which was to confer indefeasible title on every registered instrument. Registration of a writ of execution gave the execution creditor indefeasible title to a charge on the debtor's property to the amount of the writ with priority from the date of registration of the writ and so that very superiority of title over prior unregistered transferees which the court denied him.

Wilkie v. *Jellett* has recently been adversely criticised,[1] along with decisions of similar import in Australia, and compared with the case of *Pim* v. *Coyle*[2] on the Local Registration of Title (Ireland) Act establishing in Ireland a system of registration of title. A transferee whose transfer was of a date earlier than the date of registration of a judgment mortgage, that is, a certificate of judgment or writ accompanied by a memorandum of the land to be charged, had registered the transfer after the judgment mortgage; and it was contended that since the judgment debtor (and registered owner) had parted with his beneficial interest in the property by executing the transfer, there was nothing left upon which the judgment mortgage could attach. The facts of the case were thus on all fours with those in *Wilkie* v. *Jellett*. For all practical purposes, the relevant provisions of the Irish Act and those of the Real Property Act of the Territories are identical. Both Acts give priority to a registered transfer and a registered judgment or writ, accompanied by a memorandum of the land to be charged, accord-

[10] 44 S. C. R. at 292.

[1] See an article by Mr. J. E. Hogg in the *Canadian Law Times*, vol. 38 (1918).

[2] (1907), 1 I. R. 330.

ing to date of registration,[3] Both Acts declare a transfer incapable of conferring or passing an estate or interest in land until registered.[4] The Irish Act makes the register "conclusive evidence of the title of the owner to the land as appearing thereon," [5] while the Act of the Territories did the same, and, in the matter of verbal expression at all events, went further and made the register conclusive "at law and in equity as against Her Majesty and all persons whomsoever that the person named in such certificate is entitled to the land for the estate of interest therein specified." [6]

It was held that the rule against an unregistered transfer conferring an estate or interest on the transferee kept the beneficial interest in the registered owner until registration of the transfer; that the register was to be looked to and could be relied on for the registered owner's estate,[7] and for the priority of registered dealings *inter se*,[8] and that an allowance of priority to the registered judgment mortgage over the unregistered transfer represented the only way in which the legislation could be worked;[9] for any other construction of the Act would not only be contrary to its language but would frustrate its purpose by making registered titles liable to defeasance.[10]

These views coincide with the relevant conclusions reached in the previous chapter regarding the conclusive character of a Western Canadian certificate of title in the matter of a registered owner's beneficial estate or interest in his property and the indefeasible title and priority conferred by registration on one who, though he has not dealt with the registered owner in reliance on the register, registers an instrument of charge against that interest or estate. Yet the expressions used in the Irish Act are not so wide as those of

[3] 54 & 55 Vict. c. 66, ss. 36, 45 (1), (*h*) and (*i*), and 49; R. S. C. 1886, c. 51, s. 41.

[4] *Ibid.*, s. 35; *Ibid.*, s. 59.

[5] 54 & 55 Vict. c. 66, s. 34.

[6] R. S. C. 1886, c. 51, s. 62.

[7] Sir S. Walker, C., at 336.

[8] Fitzgibbon, L.J., at 337.

[9] Sir S. Walker, C., at 335.

[10] Fitzgibbon, L.J., at 337.

the Canadian Acts. There is no explicit exclusion of a court of equity from all jurisdiction to defeat the title for a registered interest save on the ground of fraud. But in spite of the absence of such an unmistakable manifestation of intention from the Act of Ireland, the Irish court of chancery found no difficulty in coming to the conclusion that the language employed was sufficient to make perfectly clear the evidential finality intended to be given to the register, the inviolate character of the rule as to priority, and that indefeasible title was got by registration; and this without regard to the question whether the holder of a registered interest had or had not dealt in reliance on the register; although the main object of the Irish Act, like that of any statute creating a scheme of registration of title to land which makes a land certificate conclusive evidence of title and estate and renders an unregistered instrument incapable of passing an estate or interest in land, must perforce be to relieve anyone dealing in reliance on the register from all necessity for going behind the register in order to determine a title's validity or for going outside of it to ascertain what persons, if any, besides the registered owner, are interested in the property.

Since the registered judgment mortgage was the Irish equivalent of a writ of execution when registered against the title or the land intended to be charged, as was the case with the writ in *Wilkie* v. *Jellett,* it is important to note what *Pim* v. *Coyle* decided concerning the extent of the judgment debtor's interest liable in satisfaction of the execution debt.[1] The rule in regard to land held by common law title, as laid down in *Whitworth* v. *Gaugrain,*[2] and confirmed by the House of Lords in *Eyre* v. *M'Dowall,*[3] was that a judgment mortgage could only attach on the debtor's beneficial interest in his property; this beneficial interest being his full beneficial interest as limited by the trusts or equities to which the property had become subject. The court was careful to

[1] In the article referred to, Mr. Hogg states that it was held that *Eyre* v. *M'Dowall* did not apply to registered land. This was not so.

[2] (1842), 3 Ha. 415.

[3] (1861), 9 H. L. C. 618.

point out in *Pim* v. *Coyle* that its decision was not in conflict with *Eyre* v. *M'Dowall*. A registered judgment mortgage still attached on the debtor's beneficial interest though his land was registered land. But the extent of this beneficial interest was defined by the Act; and was the full beneficial interest as limited by the interests of others duly entered in the register.

CHAPTER V.

The Register, Registration and Priority.

It has been said that, regarded as a whole, the register consists of the certificates of title for all the lands under the Acts, while regarded in relation to a particular property it consists of the certificate of title for that property. All the Acts define the register in the first and larger sense, and though the definitions differ in phraseology each denotes the same thing. The register is either the volumes in which certificates of title are entered and bound,[1] or the book in which are entered all certificates of title, each certificate constituting a separate folio of the book.[2] But these bound volumes of certificates of title do not constitute the entire Register. The definitions of the register in the Real Property Act of New South Wales and the Transfer of Land Act of Victoria—the principal models for the Acts of Western Canada—are identical with the definitions of the Canadian Acts, the register in each case being called a "register-book."[3] It has been said of the register-book that "this, however, is not the whole of the register, for there are two other collections of documents which form important adjuncts to it, and without which certificates of title are not absolutely complete. These consist, first, of the instruments of transfer, lease, mortgage, charge, &c., which have been executed by registered proprietors, and on the faith of which entries have been made in the register-book; and, secondly, of maps and plans deposited either on the land being originally brought under the system or subsequently on a single parcel of land being divided."[4]

Considered in relation to anyone transacting in reliance on a Canadian register, this description is too wide in one particular and not wide enough in another. Since a person

[1] Man. 2 (*x*).
[2] Sask. 27; Alta. 2 (*l*) 21.
[3] Hogg, p. 512, s. 50; p. 103, s. 32.
[4] Hogg, 763.

dealing on the faith of the register need not go behind the certificate of title, a transfer or any other instrument pursuant to which the certificate has been issued is never part of the register on the strength of which he transacts. On the other hand, a memorial of any instrument on a certificate of title is a reference to the instrument; and a reference in one document to another incorporates the latter in the former.[5] Mortgages, leases and plans, memorials of which have been endorsed on the certificates of title for the lands to which they relate, are consequently incorporated in those certificates, in other words, are part of the register. It is to be observed, however, that such instruments are complete in themselves, while a caveat, which also becomes part of the register on a memorial of it being endorsed on the certificate of title for the land which it affects, is not; for it usually refers to a document or even a series of documents upon which it is founded. Consequently in such a case not only the caveat, but also every document of which it makes mention, is part of the register. It cannot possibly be otherwise; for the precise extent of the registered owner's interest is only to be determined by an examination of all such documents. A person dealing with a registered owner is not called on to examine unregistered instruments, that is, instruments which are not part of the register. Conversely, all instruments which such a person is compelled to examine in order to ascertain the registered owner's interest are part of the register — are registered instruments; registered either directly, as in the case of mortgages, leases and plans, or indirectly, as in the case of instruments founding caveats.

The recently repealed Land Titles Act of Saskatchewan permitted registration of a caveat in order to protect an interest in land, although there was no documentary evidence to support the claim; thus overriding the Statute of Frauds.[6] The new Act of 1917 omits this provision, and it has no place in the Acts of the other two provinces. The question thus arises whether a written instrument is necessary to found a

[5] *Smart* v. *Prujean*, 6 Ves. at 565; *Llewellyn* v. *Earl of Jersey*, 11 M. & W. at 189; *In re the goods of Smart* (1902), L. R. P. at 240; *Smith* v. *City of Saskatoon*, 4 D. L. R. 521.

[6] 1913 (Sask.), c. 30, s. 15.

caveat. An answer in the negative has been given in *Re Wark Caveat*,[7] a Saskatchewan case decided in 1909 before the amendment to the repealed Land Titles Act had been passed making writing unnecessary. It was held that a caveat unsupported by a written document must remain on the register pending the decision of a court on the validity of the claim; and the logical result of such a view would seem to be that the memory of the caveator, and possibly those of other people, might have to be regarded as part of the register, for these must be examined before it could be determined whether the registered owner had alienated or encumbered the interest shown in his certificate of title, and to what extent. But it would be giving effect to the intention of the Acts that the register is to be deemed a complete record of title when anyone is transacting with the registered owner, to refuse registration to a caveat the claim set out in which was not completely evidenced by a document appropriate to the purpose; which, after all, is merely to insist, where the Acts are concerned, on a strict construction of section four of the Statute of Frauds.

For a person transacting in reliance on it the register consists, then, not merely of the certificate of title for the land with which his transaction is concerned, but also of every instrument referred to in the certificate or a memorial of which has been endorsed on the certificate, and of all documents, reference to which is made in such instruments.

An instrument is deemed to be registered under the Acts of Victoria and New South Wales when a memorial of it has been entered on the certificate of title for the land to which it relates;[8] and the intention and practice is for all memorials of registration to be entered on the folium of the register appropriated to the land affected.[9] The same intention appears in the Western Canadian Acts under which registration of an instrument consists in the endorsement of a memorial of the instrument on the certificate of title for the land to which the instrument has reference.[10] Conse-

[7] 2 S. L. R. 431.
[8] Hogg, p. 513, s. 54; p. 104, s. 35.
[9] Hogg, p. 922.
[10] Man. 90; Sask. 2, s.-s. 11 (*b*), 27, 49; Alta. 2 (*m*), 21, 22.

quently, no matter where else or in what other book or register a memorial of an instrument may have been entered, the instrument has not been registered until a memorial of it has been endorsed on the certificate of title for the land which it affects. The consequences of this position are rather important, and first of those entailed on a certificate of judgment in Manitoba.

All that the Real Property Act says about a certificate of judgment is that such a certificate is an encumbrance, and is to be registered under the Act as well as under the Registry Act;[1] that a district registrar is to have a discretion to decide whether a registered judgment is entitled in equity to priority over a later registered instrument;[2] and that a certificate of title is subject by implication to any judgment against the registered owner registered since the date of the certificate.[3] It is to be particularly noted that the Act makes specific mention in each case of a *registered* judgment only; that is, one a memorial of which has been entered on the certificate of title of the registered owner, the judgment debtor. Since a court of equity can only interfere with the priority of a registered judgment when the judgment debt has been paid, or fraud is involved, a registrar can have no wider jurisdiction; and because a certificate of judgment is not registered until a memorial of it has been made on the judgment debtor's certificate of title the implication is superfluous. For further information on the subject of registration of certificates of judgment resort must be had to the Judgments Act.[5] It is there provided that a certificate of judgment can be "recorded" in any or all of the registry or land titles offices of the province, and when "registered" in a land titles office is to have the same effect in regard to land under the Real Property Act as it has in regard to land held by common law title.[6] The act does not state what is meant by "recording" a certificate, but it defines "regis-

[1] Sections 2 (*q*) and 93.
[2] Section 95.
[3] Section 78 (*f*).
[4] See chapter on *Wilkie* v. *Jellett*, *supra*.
[5] R. S. M. 1913, c. 107.
[6] *Ibid.*, ss. 3 and 5.

tered" as signifying "registered under this or some former act of the Legislature."[7] "Some former act" obviously refers to the Judgment Acts of previous revisions of the statutes, the intention being to perpetuate the effect of registration under earlier Acts. No register is directed to be kept for entering certificates of judgment. These facts raise the inference that a certificate of judgment is both "recorded" and "registered" within the meaning of the Judgments Act as soon as the certificate has been recorded in a registry or a land titles office in the manner customary in each kind of office.

A certificate of judgment can be recorded in a registry office or on the Old System side of a land titles office in one way only, namely, by deposit of the original certificate, a duplicate original or a certified copy.[8] When this deposit has been made and the date of deposit endorsed on the certificate, the certificate has been registered within the meaning of the Registry Act.[9] But a certificate of judgment can be recorded under the Real Property Act in two ways; by entry in the general register or by endorsement on the judgment debtor's certificate of title. In the latter case the certificate of judgment has been registered within the meaning of the Act; in the former it remains an unregistered instrument. Thus, to record a certificate of judgment intended to charge land held by common law title is the same thing as to register it in the manner prescribed by the Registry Act; but to record such a certificate intended to charge land under the Real Property Act is the same thing as to register it in the manner prescribed by that Act only when a memorial of the certificate has been endorsed on the judgment debtor's certificate of title for the land intended to be charged with the judgment debt.

Even if the words "recorded" and "registered" mean registered in the sense of the Registry and Real Property Acts respectively, the same conclusion obviously follows; and a certificate of judgment affecting land under the Real Pro-

[7] *Ibid.*, s. 2 (*d*).
[8] R. S. M. 1913, c. 172, ss. 34 and 49.
[9] *Ibid.*, s. 50.

perty Act is not registered within the meaning of the Judgments Act until it has been endorsed on the judgment debtor's certificate of title.

When recorded under the Old System a certificate of judgment binds and forms a lien and charge on the judgment debtor's lands from the date of its recording in the same way as a charge of the amount of the judgment debt created by a deed under the debtor's hand and seal would bind and charge his lands.[10] Such a charge is a valid equitable charge if and when the lands can be ascertained.[1] That is all the effect which the Judgment Act by itself gives to a recorded certificate of judgment. But by virtue of the provisions of the Registry Act the registration of a certificate converts it into a registered instrument. As such it has priority from the date of registration,[2] and its registration is notice.[3] Where, therefore, Old System land or land held under common law title is concerned, the combined effect of the Judgments Act and the Registry Act is to give a recorded certificate of judgment the same efficacy as that of a duly registered deed securing a debt when the land has been ascertained. Consequently a purchaser of land held by common law title cannot safely purchase such land without searching for registered certificates of judgment.

A wholly different situation obtains in regard to land under the Real Property Act. When a certificate of judgment is recorded on the judgment debtor's certificate of title the cumulative effect of the Judgments Act and the Real Property Act is to convert the certificate of judgment into a registered charge with priority from the date of registration.[4] When, however, a certificate is recorded anywhere else, whether in a day-book, receiving book, or general register, it is

[10] R. S. M. 1913, c. 107, s. 3.

[1] *In re Kelcey* (1889), 2 Ch. 530; Fisher *On Mortgages* (6th ed. Can.), paragraph 24.

[2] R. S. M. 1913, c. 172, s. 69.

[3] *Ibid.*, s. 67.

[4] Man. 89. The provisions in the Judgments Act, that a registered certificate is to have the same effect as it has under the Old System, cannot deprive it of its indefeasible title nor of its right to rank on the debtor's beneficial interest as shown by the register at the date of its registration.

not registered and the net result of the provisions of the two Acts is to leave it an unregistered instrument. As such it does not bind or charge the land as against anyone dealing with the judgment debtor in reliance on his certificate of title—the register; for such a one is expressly authorized by the Real Property Act to ignore all unregistered instruments as not being part of the register unless he has received such notice of them that to disregard the notice would be a fraud on the parties interested.[5] Consequently a purchaser of land under the Act can safely close his bargain without searching outside of the vendor's certificate of title for certificates of judgment against the vendor.

The Land Titles Act of Saskatchewan directs an execution register to be kept in which are to be entered all writs of execution entered in the day book.[6] But until endorsed on the execution debtor's certificate of title a writ of execution remains an unregistered instrument which a person dealing with the debtor can ignore, unless it has come to his notice in such a way that to pass it over would be a fraud on the execution creditor.[7] A certificate of title is, however, made subject by implication to any writ of execution filed against the registered owner, that is, entered in the day book.[8] This provision consequently seems to make the execution register part of the register proper.

In Alberta a special register is kept for recording writs of execution,[9] but their entry in it is not made registration of them; and until entered on the execution debtor's certificate of title a writ remains an unregistered instrument[10] which any one dealing with the execution debtor in reliance on the register need pay no attention to, unless he has received such notice of the writ as to make his disregard of it a fraud on the execution creditor.[1] A certificate of title is subject by implication to a registered writ only;[2] and since this

[5] *Ibid.*, s. 99.
[6] Sask., 29.
[7] Sask., s. 194.
[8] Sask., 60 (*e*); 2 s.-s. 12.
[9] Alta., 77 (2).
[10] *Ibid.*, 2 (*m*).
[1] *Ibid.*, 135.
[2] *Ibid.*, 43 (*e*).

implication cannot arise until a writ has been endorsed on the certificate of title the provision is unnecessary. After the receipt of a writ in a land titles office the debtor's lands are bound by it.[3] If the use of the writ of *fieri facias* for levying execution against real property can be considered as having made the rules governing executions against goods applicable to executions against lands, a conclusion which it is difficult to resist and one upon which judicial interpretation seems to have proceeded, then the result of the debtor's lands becoming bound is that he can only alienate and give a valid title for them to a bona fide purchaser without notice of the writ.[4] The recording of a writ in the execution register is not made notice of the writ. A purchaser transacting with the execution debtor in reliance on the register is absolved from all obligation to look outside of the register for writs against the debtor, fraud apart; and it is not fraud to abstain from doing something when the abstention is expressly authorized by an act of parliament.

But the Alberta Act provides, further, that after the receipt of a writ of execution no transfer or other instrument executed by the execution debtor is to be effectual save subject to the rights of the execution creditor under the writ.[5] What are those rights as against a purchaser transacting with the execution debtor in reliance on his certificate of title, the register? When a memorial of the writ is endorsed on the certificate of title, in other words when it is registered, the purchaser, if he accepts the debtor's title, takes subject to the registered writ as he would take subject to a registered encumbrance or mortgage. On the other hand, if the writ is only entered in the execution register it is not registered and the execution creditor is merely the holder of an unregistered instrument which can pass no estate or interest as against the purchaser unless he has received such notice of it as to ignore which would be a fraud on the execution creditor.[6] The execution creditor,

[3] *Ibid.*, 77.

[4] See chapter CERTIFICATES OF JUDGMENT AND WRITS OF EXECUTION, *infra*.

[5] Alta. 77.

[6] Alta. 135.

therefore, has no rights at all against a bona fide purchaser—only against a fraudulent one.

Thus, as in Manitoba, so in Alberta, there is no need for a purchaser to search for writs of execution against a vendor.

It has been said of priority that "the whole object and policy of the Act (of the Territories) as shown by all the sections referring to registration is for the purpose of determining the priority of every instrument . . . in the order of their registration in the Register."[7] Though the statement is too narrow it recognizes the importance of the fact that registration of an instrument confers an indefeasible priority on it. The rule is fundamental; is the absolute rule when part of any registry act; and is only to be set aside for fraud;[8] and a necessary consequence of the conclusive character of a certificate of title is that a certificate is conclusive evidence of the priority of every instrument registered on it.[9] Priority "is not a mere matter of formal procedure, it means something substantial, namely, that the party holding the priority has the right to have the claim paid out of the property against which his security attached before any other person is paid."[10]

[7] Rouleau, J., *Re Massey Mfg. Co.* v. *Hunt*, 2 Terr. L. R. at 86.
[8] Hals., vol. XXIV., p. 306.
[9] See chapter on *Wilkie* v. *Jellett*, *supra*.
[10] Wetmore, J., *Re Massey Mfg. Co.* v. *Hunt*, *supra*.

CHAPTER VI.

Registration and Notice.

Opinions as to whether registration of an instrument is constructive notice of the instrument (or interest) registered have been varied and conflicting. So far the caveat has supplied the occasion for all discussions of the subject. The views expressed are to be found in such cases as *Alexander* v. *Gesman*,[1] *McKillop & Benjafield* v. *Alexander*,[2] the former case in appeal, *Reeves* v. *Stead*,[3] *Stephen* v. *Bannan*,[4] and *Royal Bank of Canada* v. *Banque de Hochelaga*.[5] In *Alexander* v. *Gesman*, Newlands, J., doubted whether registration of a caveat was notice of it. *In McKillop & Benjafield* v. *Alexander*, Anglin, J. said the question was an open one, while Duff, J. definitely held registration not to be notice, at all events to a person subsequently dealing with the land; a conclusion which he added to later by deciding in *Grace* v. *Kuebler*,[6] that registration was not notice to anyone interested under a prior unregistered instrument. *Reeves* v. *Stead* was heard by Parker, M.C., who took the view that the registered caveat in that case was notice of the mortgage upon which it had been founded, and which could not be registered because the mortgaged property had been wrongly described. In both *Stephen* v. *Bannan* and *Royal Bank of Canada* v. *Banque de Hochelaga* the court held, in the former case unanimously, in the latter with one exception, that registration constituted notice. Australian opinion has been similarly divided. Hogg says that registration is notice to all the world.[7] On the same page and elsewhere he modifies this assertion by others to the effect that regis-

[1] 4 S. L. R. 111.
[2] 45 S. C. R. 551.
[3] 13 D. L. R. 422.
[4] 6 A. L. R. 418.
[5] 8 A. L. R. 125.
[6] (1917), 3 W. W. R. 988.
[7] Australian Torrens System, p. 886.

tration of a caveat is not notice on every case.[8] A recent Australian pronouncement on the subject is a dictum of Griffiths, C.J., in *Butler* v. *Fairclough,* where he says: "A caveat . . . in my opinion, operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat." This can hardly mean anything less than that registration of an instrument or interest is notice not only to persons who subsequently deal with the land but also to such as have dealt with it prior to the registration, and whether the instruments or interests which they have secured are unregistered or registered. The assumption underlying most of these opposing views seems to be that it is possible to decide between the rival claims to priority of instruments and interests registered under a Torrens Act, or between the claims of such instruments and interests and others not registered, by applying the equitable doctrine of constructive notice. Consequently the most direct way out of the existing maze of divergent opinion will be to consider the history of the application of that doctrine to such cases arising under the Registry Acts which preceded the Torrens system of registration, and then to consider whether the character of the title created by the system permits of the principle of constructive notice being applied at all.

The earliest Registry Acts were those of Yorkshire and Middlesex, and the first reported case in which the registration of an instrument was claimed to be notice of its existence is *Wrightson* v. *Hudson,*[9] where a mortgagee with a registered mortgage, which had not been expressed to secure future as well as past advances, lent the mortgagor an additional sum after a third party had made a loan to him and had registered a charge to secure it. The holder of this second charge contended that the registration of the charge was constructive notice of it to the first mortgagee and since, where there are Registers, every encumbrancer should be satisfied according to the priority of his registration, the second charge should have priority over the first mortgagee's

[8] *Ibid.*, pp. 963, 1039 and 1040.

[9] 2 Eq. Ca. Abr. 609.

later advance. "Yet it was resolved" that the Registry Acts only avoided prior charges not registered but did not give subsequent conveyances any further force against prior registered ones than they had before; and that, in order to have affected the first mortgagee, the second encumbrancer ought to have given him notice of the second encumbrance. *Wrightson* v. *Hudson* was followed in the next and precisely similar case of *Bedford* v. *Bacchus*;[10] and the view that registration of a deed is not constructive notice of its existence to a person subsequently acquiring an interest in the property has been uniformly accepted and applied ever since,[1] notwithstanding an occasional expression of doubt as to its correctness.[2]

It was also held in *Wrightson* v. *Hudson* that although the first mortgagee might have searched the Register he was not bound to do so.

Whatever criticism any later decisions may be open to the judgments in *Wrightson* v. *Hudson* and *Bedford* v. *Bacchus* seem sound enough. The sole object of the Registry Acts was to prevent secret and on that account possibly fraudulent conveyances and mortgages, and they had only altered the law in so far as was necessary to achieve this purpose. Unregistered prior deeds were made void against registered deeds. But that was all. One registered deed was given no precedence over another by registration and priority was thus left to be regulated by existing rules. In each of the cases in question the legal estate had been conveyed to the first mortgagee and to it he could tack any later advances. To prevent this it was incumbent on an intermediate mortgagee or chargee of the equity of redemption to give actual notice of his encumbrance to the first mortgagee.[3] Having registered their mortgages the first mortgagees had met the one requirement of the Acts compliance with which was necessary to avoid defeat of their estates or interests by other estates or interests which might be registered while theirs

[10] *Ibid.*, 615.

[1] *Manks* v. *Whitely* (1912), 1 Ch. at 757.

[2] See *Morecock* v. *Dickens*, 2 Amb. 678, and *Re Russell Road Purchase-moneys*, 12 Eq. 78.

[3] Coote *Law of Mortgages* (7th ed.), pp. 53 and 1238.

were not. In so doing they had also enabled the Acts to achieve their single purpose of securing publicity for the mortgage deeds. As mortgagees, therefore, they were no longer concerned with the registers, least of all in the matter of subsequent encumbrances, for these could only be on the equities of redemption and the recognized principle of tacking had been left untouched. Neither expressly nor by implication had the Acts relieved equitable mortgagees from the obligation of giving legal mortgagees actual notice of second or equitable mortgages nor imposed on legal mortgagees any duty to search the registers before making further advances to their debtors. Consequently the first mortgagees were not called on to inquire or search further than they would have had to if the Acts had not been passed. To open a door to the application of the doctrine of constructive notice the circumstances attendant on the making of the subsequent advances must have fallen into one of three categories of cases; the first, those in which the party charged has received actual notice that the property had in fact been encumbered, or in some way affected, and has consequently been held fixed with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the encumbrance or other dealing; or secondly, cases where there has been evidence that the party charged has designedly abstained from inquiry for the very purpose of avoiding notice;[4] or, lastly, where there has been "a degree of negligence so gross (crassa negligentia) that a court of justice may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent."[5] There had not been actual notice; nor could there by any suggestion of wilful abstention or gross negligence since there was no obligation to search the registers.

If, however, cases like *Wrightson* v. *Hudson* and *Bedford* v. *Bacchus* were to arise to-day under the lastest English Registry Act, the Yorkshire Act of 1884 as amended by the Act

[4] *Jones* v. *Smith*, 1 Hare at 55.

[5] *West* v. *Reed*, 2 Hare at 259.

of 1885, they would apparently be decided in quite the opposite sense. The terms of the new act have rendered tacking impossible. This is not the result of express legislation but because the act gives registered instruments priority amongst themselves according to date of registration. As a consequence mortgagees who propose to make later advances beyond the sums secured by their mortgages (the mortgages not being expressed to cover future as well as past advances) are placed in the same position as persons dealing with the land for the first time. Their later advances will be subject or postponed to any intermediate charges or dealings registered since the dates of registration of their own mortgages; and if they wish to avoid increasing the amounts of their loans to their debtors subject to this eventuality they must, as they can, search the registers in order to ascertain whether any such intermediate charges or dealings have been placed on record in them. But this is not to say that registration is constructive notice of registered charges or dealings. The question of notice does not enter at all. It is one of priority. Search or no search, notice or no notice, knowledge, actual or constructive, or no knowledge at all, dealings registered before the later advances are made have priority over them and this because the Registry Act has so provided in express terms. A statutory rule of priority has been set up which speaks with the finality of a law of nature. The working of such a law is wholly independent of knowledge or ignorance of its effect in any particular case. Whether he is aware or not that he has an elder brother a younger son is inevitably the junior of such a brother. Equally, whether he knows or is ignorant of the existence of a prior registered interest, a person who registers his interest later must of necessity rank after the holder of the prior interest.

This ousting of the rules of constructive notice by the statutory rule of priority according to date of registration was first recognized in *Bushell* v. *Bushell*.[6] The Registry Act of Ireland was very similar to the older Yorkshire Acts. A life-tenant under a registered marriage settlement had made a testamentary devise of the settled property inconsistent with

[6] 1 Sch. & Lef. 91.

the terms of the settlement. The will containing the devise had also been registered. The devisee entered and subsequently died intestate and insolvent, and the property was sold to pay his debts. The purchaser only learnt of the marriage settlement after the sale and claimed to be a bona fide purchaser without notice of it. The issues became narrowed down to the question whether registration of the deed of settlement was notice to the world of its existence. Lord Redesdale, C., pointed out the material difference between the Irish Registry Act and the original Acts of Yorkshire and Middlesex, namely, that the Irish Act had established a new rule of priority for registered deeds, that they were to take precedence according to their respective dates of registration; a provision which was then wanting to both of the English Acts. Consequently the purchaser who contracted without searching the register and after completing his purchase registered his conveyance had to accept a title subject to any previously registered estates. And this not because the Registry Act was notice, for he did not think it was, but because the Act had given the registered instruments a priority which a court of equity or law could not take away.

Opposing claims to priority between registered instruments do not seem to have come up for decision under the Registry Act of Ontario until after precedence amongst them had been made determinable by date of registration; the fact of registration being at the same time made actual notice of the instrument registered to all persons subsequently dealing with the property.[7] Both these provisions have been included in the successive Registry Acts of Manitoba.[8] That giving registration the effect of actual notice is, it would seem, superfluous. The state of mind of anyone dealing with a property after a prior interest in it has been registered, his real or presumed knowledge of the registration of the prior interest, can have as little effect on its right to priority over his own transaction as knowledge or ignorance in a younger child that he had an older brother can affect the latter's right to senior-

[7] 13 & 14 Vict. c. 63, ss. 4 and 8; see now R. S. O. 1914, c. 124, ss. 72 and 75.

[8] See now R. S. M. 1913, c. 172.

ity. The operation of the statutory rule of priority according to date of registration was already as inevitable as primogeniture, and could not be rendered more so through the aid of an auxiliary rule making registration equivalent to actual notice. Once registered deeds are given precedence according to their dates of registration the question whether subsequent purchasers or mortgagees are to be considered as having notice of them because they are registered no longer demands an answer. The statute has expressly made priority dependent on registration and not on notice. Notice, therefore, is simply not a term in the equation; it has no place at all when priority between registered instruments is in dispute.[9]

Lord Redesdale said of the principle which he was laying down in *Bushell* v. *Bushell* that it would answer the purpose of every decision on the subject of priority between registered deeds,[10] and an application of the principle to the Ontario cases, all but one of which were made to turn on registration being notice, supports his conclusion. It would give the same result in *Boucher* v. *Smith*[1] in respect of the unregistered claim of one purchaser (McLaughlin) of a part of a property mortgaged by the same (registered) deed with another property, the latter having been mortgaged a second time (this deed also having been registered) and then sold by the first mortgagee; the purchaser's claim being postponed to the second mortgagee's right to have both properties made liable for satisfaction of the second mortgage on the principle of marshalling; but, in entailing the same consequence on the purchaser (Smith) of the other part of the same property, as it must have done, his deed having been registered, the application of Lord Redesdale's judgment would, to that extent, have led, and seemingly properly led, to a different decision. In *Trust and Loan Co.* v. *Shaw*,[2] where two properties were also included in a single mortgage, the first mortgagee's release of one of them would still have been held good, as it actually was, against the claim of a second mortgagee of the other property

[9] Except as raising the question of fraud.

[10] 1 Sch. & Lef. at 102.

[1] 9 Gr. 347.

[2] 16 Gr. 446.

to have the amount secured by the first mortgage reduced by the value of the property which had been released; not, however, for the reason given, namely, that a person parting with an interest in land need not search the register, but on the ground of the priority secured by the registration of the first mortgage for the exercise by the first mortgagee of all his rights as such, the entire "subject matter," to use an expression of the Real Property Act of Manitoba[3], represented by the first mortgage, including the right of releasing any part of the security when no actual notice had been received of later acquired interests in it. The judgment in *Gilleland* v. *Wadsworth*[4] would not have been other than that given, the competition there being between a registered assignment of a mortgage not itself registered and a later registered conveyance. Nor would a different conclusion have been reached in *Haynes* v. *Gillen*,[5] in which case a part only of a lot had been sold, but the whole lot conveyed in error and the conveyance registered, the purchaser subsequently conveying the whole lot to a third party who had registered his deed, but not until after another conveyance had previously been registered of the part not sold and not intended to be conveyed to the first purchaser; the result being that the third party who had bought the portion of the lot not intended to be sold was allowed priority, to the extent of his purchase, over the purchaser of the whole lot. The principle seems to have no relation to *Brown* v. *McLean*,[6] because the right of a judgment to priority over a registered mortgage was not, apparently, dependent on the provisions of the Registry Act. Had it been the governing consideration an opposite decision would have been given in *Abell* v. *Morrison*,[7] where the grantee under a conveyance registered subject to two mortgages and a mechanics' lien who had paid off and registered discharges of the mortgages, was allowed priority over the holder of the lien on the ground that he had registered the discharges and

[3] Man. 151.
[4] 1 App. R. 82.
[5] 21 Gr. 15.
[6] 18 O. R. 533.
[7] 19 O. R. 669.

his own conveyance by mistake (the mistake being omission to search the register immediately before lodging his deeds for registration though he had made a search some days earlier) and, consequently, had brought himself within the equitable doctrine which resuscitated the discharged mortgages for his benefit. The grantee would have been told, first, that the obligation to search continued up to the moment of presentation of his deeds for registration,[8] and, secondly, that the registration of the discharges left the mechanics' lien a first encumbrance on the property and entitled to priority accordingly: which would confirm, though on other grounds, Armour's view that the case had been wrongly decided.[9] An application of the principle to the facts in *McLeod* v. *Wodland*[10] would have led to the same result as ensued in that case, where a third mortgagee who had paid off and registered a discharge of the first mortgage and claimed priority over the second mortgagee on the ground that he, the third mortgagee, was entitled, by virtue of the payment, to all the rights and priority of the first mortgagee, found himself postponed to the second mortgagee; but it would lead to this result not, as was held, because the third mortgagee through his conduct, had lost his right (if he had any) to stand in the shoes of the first mortgagee, but because he could not possibly have that right under the Act in the circumstances. In order to acquire the first mortgagee's right to priority the third mortgagee should have taken an assignment or transfer of the first mortgage instead of a discharge; and having adopted the latter course the second mortgage ranked first and his mortgage after it. In *Armstrong* v. *Lee*,[1] the defence of want of notice would still have been ruled out, not, however, on the ground that notice had been received but on that of priority.

Coming next to the cases of priority between registered instruments decided under the Registry Act of Manitoba, if the view adopted in *Bushell* v. *Bushell* had been applied in them it would have led to the same result in *Robock* v.

[8] *Millar* v. *Smith*, 23 C. P. 47.
[9] *On Titles*, p .88.
[10] 25 O. R. 118.
[1] 27 O. R. 511; 24 O. A. R. 543.

Peters,[2] where the order of priority amongst some half dozen instruments had to be settled; and in *Waterloo* v. *Bannard,*[3] where the priority of the claim under the first registered instrument was, however, lost through the operation of the Lien Notes Act. But in *Dean & Chapter* v. *McArthur,*[4] the decision would have been the opposite of the one actually given. The Dean and Chapter of St. John's Cathedral, Winnipeg, holders of a registered mortgage, had accepted a quit claim deed of the mortgaged property from the mortgagor in full settlement of their claim against him. Through the negligence of a clerk the deed had been registered although a certificate of judgment was registered ahead of it. The quit claim deed was given priority over the judgment, a result not inequitable in the particular circumstances of the case, but only reached by disregarding *in toto* the rule of priority established by the Registry Act, and thrusting aside the well settled law that a principal must accept the consequences of employing a careless agent; and, "it is better to carry out a sound principle to its just limits, even at the occasional expense of individual hardship, than to render the law uncertain and fluctuating by arbitrarily refusing to apply an acknowledged principle to cases within its range."[5] *Stanger* v. *Monder*[6] afforded no ground for applying the rule in the Irish case as the issue was whether priority could be lost through negligence of a registrar, and it was held that it could not.

Since the Real Property and Land Titles Acts rank registered instruments according to date of registration, and as this rule of precedence necessarily excludes all discussion of the question whether registration is notice of the instrument registered, the doctrine of constructive notice can have no application to the settlement of rival claims to priority of instruments registered under those Acts any more than to the settlement of similar claims under the Registry Acts. Priority cannot depend on notice; only on registration. To

[2] 13 M. L. R. 124.
[3] 25 M. L. R. 817.
[4] 9 M. L. R. 391.
[5] *Jones* v. *Smith,* 1 Ha. at 71.
[6] 20 M. L. R. 280.

this rule there seems to be but one apparent exception; apparent because, though the question of notice is involved, the real issue is one of fraud. Under the Acts all estates and interests in lands are equitable until registered and of two equitable estates or interests the later may be registered first with knowledge or notice of the prior estate or interest then unregistered but afterwards registered. It may be claimed that the earlier registration is a fraud on the later, and the fact of notice will be part of the issue. But the notice contended for will be actual notice of a prior unregistered estate or interest[7] and not one of a registered one. A consideration of the exception has no place here where the concern is with registration as constructive notice and not with actual notice as fraud.

In order to make clear the application to a caveat of the conclusions so far reached it is necessary to say something as to the real character of that instrument.[8] It is, to begin with, a registrable instrument, and though usually spoken of as filed is, in point of fact, registered. When registered it secures for the interest for which it stands, if a valid one, an indefeasible title from the date of the caveat's own registration. Though the instrument creating the interest claimed is not directly registered through the entry of a memorial of the instrument itself on the register, yet it is indirectly registered by means of the caveat; for the memorial of the caveat incorporates the caveat with the register by reference and the reference in the caveat to the instrument upon which it is founded in turn makes the instrument part of the register. Consequently a competition for priority between an interest directly registered through registration of the instrument creating it and an instrument registered indirectly by means of a caveat based on it is strictly a competition between registered instruments as much as a like competition between a mortgage and a lease both of which have been directly registered. And when rival claims to priority are made by an unregistered interest and one registered by means of a caveat the contest is equally one

[7] Man. 99; Sask. 194; Alta. 135.

[8] See further: THE CAVEAT, *infra*.

between an unregistered interest and one which has been registered.

Since the Acts confer priority on registered instruments in order of their registration all that has to be done (in the absence of fraud) is to ascertain the date of registration of each. To go further and consider whether registration is notice adds no knowledge which one can make any difference to the result, while the inquiry may obscure the issue. Though opinions were expressed in *Stephen* v. *Bannan* and *Royal Bank of Canada* v. *Banque de Hochelaga* to the effect that a caveat was notice, that is constructive notice, for the Acts do not make it actual notice, yet those cases were decided strictly according to the rule of priority which the Acts have established. So, again, although the possibility of registration being notice was referred to in *McKillop & Benjafield* v. *Alexander,* the principle that precedence between registered interests is, fraud apart, governed solely by the rule of priority set up by the Acts was applied. Anglin, J., whose judgment was accepted by the majority of the court, said that as the second purchasers had omitted to search the title before completing their purchase they "could not complain if the prior equity of the plaintiff protected by his caveat is held to be paramount." The reference to the caveat indicates that the issue was not regarded as one of competing equities. Indeed it is impossible, if proper respect be paid to precision of language, to talk in connection with the Acts of priority save as between registered instruments. Just as the common law knows nothing of equitable rights so the Acts do not regard unregistered interests. The first purchaser had registered a caveat while the second, the vendor having fraudulently sold the land twice over, had not. Consequently only the former had, so to speak, any *locus standi* in the forum of the Acts. His interest was therefore, "paramount" so far as they were concerned, because, having been registered through the caveat while the other interest had remain unregistered, it was the only interest which the Acts could recognize. The sole point thus left or rather presented for decision was the validity or otherwise of the first purchaser's claim and that, to continue the figure, had to be tried

in another forum, the forum of equity. It was there held to be valid and its "paramountcy," or, to use a more accurate expression, its right to priority from the date of its registration, was left undisturbed. Duff, J., dissenting, held that the first purchaser had no right capable of founding a caveat, but it is clear that if he had been able to come to an opposite conclusion his judgment would have been the same as that of the majority of the court. In the provincial appeal,[9] the supreme court of Saskatchewan had expressed the opinion that it was not necessary to consider whether registration of the caveat was notice of it. Mr. Justice Duff took the same view on the ground that the point was immaterial. He said: "The statute does not say that the caveat shall operate as notice of the facts stated in it to intending purchasers, and there is not anything in the statute giving the least ground or colour for attributing to it any such operation. If an intending purchaser chooses to close his purchase by paying his purchase money without first acquiring registered title, he runs the risk of finding that he cannot get a registered title until some unregistered claim has been satisfied, or some unregistered interest acquired"—one not registered directly is evidently meant. "But he incurs this risk not because he is deemed to have had notice of the claim and for that reason to be bound in good faith to recognize it, but because he can only acquire a title by registration, and registration he cannot have free from an enforceable claim against the registered title in face of a caveat founded upon such a claim until that claim has been satisfied or the superiority of his claim has been established." The supreme court of Saskatchewan and the minority of the court of appeal at Ottawa were thus at one in holding that the terms of the Act precluded all discussion of whether registration of an instrument such as a caveat was notice of it to a subsequent purchaser. The interest acquired after the caveat had been registered was subject by virtue of the rule regarding priority to the right, if valid, for which the caveat stood, and the only matter for decision was the validity or invalidity of that right.

[9] *Alexander* v. *Gesman, supra.*

In the opinion of Mr. Justice Duff, the doctrine of constructive notice had been swept away by section 173 [10] of the Saskatchewan Act which, with the corresponding sections of the other two Acts, made an unregistered instrument incapable of passing an estate or interest against anyone dealing with a registered owner, although he had received constructive or even actual notice of the instrument, unless, in the latter case, his ignoring of the actual notice received would amount to fraud. But, as the words of the sections indicate, this provision is limited to unregistered interests; nothing is said of interests registered. According to the decision in *Bushell* v. *Bushell* the application of the principle of constructive notice has been excluded in respect of registered and unregistered instruments both by the introduction of the rule of priority according to date of registration of an instrument. This view is the same as that held in regard to the Yorkshire Registry Act of 1884, as amended in 1885, and which has adopted a similar rule as to the priority of registered instruments[1] The view coincides with the conclusions already drawn from a consideration of the necessary implications of the rule—notice or no notice, knowledge or no knowledge at all, search or no search, a later registered instrument inevitably ranks after one registered earlier. Mr. Justice Duff cited another decision of the Irish chancellor [2] to illustrate the difference between the effect of registration and that of notice. After reiterating the opinion already expressed in *Bushell* v. *Bushell,* that registration was not notice, the chancellor proceeds: "Actual notice might bind the conscience of the parties; the operation of the Act may bind their title but not their conscience." In other words, by not searching the register a purchaser can deliberately or carelessly avoid the actual notice of registered instruments which a search would give him, and that without suffering imputation of *mala fides* or fraud; but his title will automatically be subject or postponed beyond dispute to all instruments which a search would have disclosed. On the

[10] Should be s. 162; now s. 194; Man. 99; Alta. 135.

[1] Hals., vol. XXIV., p. 306, paragraph 555.

[2] *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. at 66.

other hand, actual notice of a prior unregistered interest may bind a purchaser's conscience and may also bind his title if he deliberately or carelessly abstains from making certain, before it is acquired, that the prior interest will not impair it. In the one case the priority of the title acquired is regulated by the terms of the Acts and by them alone; notice has no place. In the other equity determines the priority of the purchaser's title within the limits which the Acts allow, the main issue being whether the actual notice received imputes fraud.

The position can be described in a sentence. Under the Acts there is no such thing as notice; only fraud.

CHAPTER VII.

A Vendor's Interest in the Property Sold.

Before proceeding to a discussion of the character and effect of a caveat it is necessary to consider part of the judgment in *Grace* v. *Kuebler*,[1] where it was held that unpaid vendors under an agreement of sale of land payable in instalments could not assign the agreement and give a transfer of the land as security for a loan, in short, create an equitable mortgage of their interest in the land, because "an owner of land who has agreed to sell it has parted with his ownership and has nothing left but the bare legal title." It seems not open to doubt that the Western courts were right in giving effect to an opposite opinion in *Adanac Oil Co.* v. *Stocks*,[2] and *Weideman* v. *McClary Manufacturing Co.*[3] and holding that an unpaid vendor retains a substantial interest in the property sold.

Two of the leading cases in which the effect of a contract of sale has been considered are *Wall* v. *Bright*[4] and *Lysaght* v. *Edwards*.[5] It is important to recall the fact that neither of them was concerned to determine the respective rights of a vendor and a purchaser as against each other. In each the court had to construe the meaning of a testamentary devise and the facts of each were practically identical. The testator had died while a contract of his for the sale of land to be paid for by instalments was still executory, some of the instalments not having matured, and the question raised in both cases was whether the testator at the time of his death was a trustee for the purchaser and his estate a trust estate, with the result, in *Wall* v. *Bright*, that it would pass to the next-of-kin instead of to the trustees under the will, and, in

[1] 34 W. L. R. 945; (1917), 1 W. W. R. 1213; (1917), 3 W. W. R. 983.

[2] 11 A. L. R. 214.

[3] 10 S. L. R. 142.

[4] (1820), 1 J. & W. 494.

[5] (1876), 2 Ch. D. 499.

Lysaght v. *Edwards,* that it would go to the devisee of all estates vested in the testator as trustee. The answers given have but an historical interest now since the Land Transfer Act of 1897 vests all estates in the personal representative, legislation anticipated here by some years, but the actual decisions were preceded by discussions of the kinds or degrees of ownership of a vendor and a purchaser respectively in the land sold while the contract was still in course of completion, and it is these discussions which give the cases continued weight as authorities.

By way of preliminary to a consideration of the particular issue in each case the general effect of an agreement of sale on the respective positions of the parties to it is first described. Sir Thomas Plumer, M.R., says in *Wall* v. *Bright* that when the vendor has entered into the contract the land "is in equity no longer his; he is considered constructively to be the trustee of the estate for the purchaser, and the latter as trustee of the purchase-money for him."[6] The statement of Sir George Jessel, M.R. in *Lysaght* v. *Edwards* is much fuller. "It appears to me," he says, "that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."[7] But of these descriptions of the immediate consequences of a contract of sale on the ownership of the property sold it has been roundly asserted that such "phrases are misleading . . . they do not apply unless the contract is completed by specific performance";[8] and if specific perform-

[6] At p. 500.

[7] At p. 506.

[8] Ashburner *Principles of Equity,* p. 562. Mailand's comment on Austin's view that a contract of sale at once vests *jus in rem,* or ownership, in the buyer, and the seller has only a *jus in re aliena*

ance is not made the purchaser may not be considered as ever having been the owner of the land. As he proceeds in his judgment, however, Sir Thomas Plumer developes his views of the trusteeship of a vendor and the estate of a purchaser in such a manner as materially to qualify the general rule which he had laid down at the outset. After referring to some of the possible events which may prevent the completion of the contract, such as the purchaser's failure to pay and his bankruptcy, which must result in the vendor again becoming the absolute owner, he goes on to say that "the vendor, therefore, is not a mere trustee: he is in progress towards it, and finally becomes such when the money is paid and when he is bound to convey." These facts, he continues, are reflected in the corresponding character and growth of the purchaser's interest, for "the ownership of the purchaser is inchoate and imperfect; it is in the way to pass but it has not yet passed"; [9] not wholly passed, that is, until the contract has been completed on his side and he is able to claim specific performance of it.

This idea of an inchoate and imperfect ownership in the purchaser while the contract is still executory is repudiated by Jessel, M.R. in *Lysaght* v. *Edwards*. His words are emphatic: "I cannot accept that as law. The ownership passes the moment the contract is made, if valid." [10] It has to be remembered, however, as already observed, that he was construing the terms of a will and wished to establish the position that an agreement of sale, executory at the time of the testator's death, had converted the testator's interest into a trust estate; and to accept the view that the testator's interest was partly a trust estate and partly something else would apparently result in the particular circumstances of the case in the title to the trust part being found in a specific devisee of all estates vested in the testator as trustee and title to the other part in his executors. Otherwise it is difficult to understand how the Master of the Rolls came to ignore, as it would seem, the confirmation given to the opin-

is much more severe. It runs: "Now as a piece of speculative jurisprudence this seems to me nonsense" (*Equity*, p. 111).

[9] Pages 501, *et seq.*

[10] At p. 518.

ion of Sir Thomas Plumer by the House of Lords in *Rose* v. *Watson*,[1] which Sir George Jessel himself cited. In that case a vendor and purchaser, the purchase-money having been made payable in instalments, were in dispute as to their respective rights. The purchaser had repudiated the contract on the ground of misrepresentation and was claiming for a refund of what he had paid up to the date of the repudiation. The relevant portion of the judgment of Westbury, L.C., runs: "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of that contract, and, to the extent of the purchase-money so paid does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate."[2] It is to be noted that the Lord Chancellor's statement that the entire ownership passes is limited to an immediate sale; that is either for cash down or part cash and the balance to be left on mortgage, the purchaser being in a position to claim specific performance by tender of the money alone or tender of the money and readiness to execute the mortgage. Lord Cranworth, in the same appeal, selects another limitation within which to express the general rule: "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mort-

[1] (1864), 10 H. L. C. 671.
[2] At p. 678.

gage to him of the estate to that extent." [3] Clearly these judgments say with Sir Thomas Plumer that until the purchase-money has all been paid the purchaser's ownership is inchoate and has not fully passed. Clearly, also, while the purchaser's ownership is but partial that of the vendor persists.

There is a third leading case in which the respective positions of a vendor and purchaser were considered, namely, *Rayner* v. *Preston*,[4] and the opinions expressed carry with them the suggestion that they were given with the judgment of Sir George Jessel in *Lysaght* v. *Edwards* in mind. Brett, L.J., says: "There was a contract of purchase and sale between the plaintiffs and defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of Equity will enforce by means of a decree of specific performance. . . . I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other." [5] The view of James, L.J., is given in the following terms: "I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri*, the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui*

[3] At p. 682.
[4] (1881) 18 Ch. D. 1.
[5] At p. 10.

que trust. That is to say, it is ascertained that while the legal estate was in the vendor the beneficial or equitable interest was wholly in the purchaser. And that in my opinion is the correct definition of a trust estate."[6]

One of the most recent pronouncements on the subject of the trusteeship of a vendor is contained in the Privy Council appeal of *Miller* v. *Howard.*[7] Part of the judgment runs: "It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract." *Kilmer* v. *B. C. Orchard Lands,* another appeal to the Privy Council,[8] affords an example of the effect of this limitation. The purchaser was a few days late in paying the second instalment and the vendor company cancelled the sale. An action for specific performance was brought by the purchaser and was successful in the court of first instance and in the final appeal. The purchaser had been let into possession and in addition to payment of the purchase-money had to construct certain irrigation works. The effect of the judgment was to declare the vendor, if and in so far as he was a trustee, trustee of such of the beneficial estate which had passed to the purchaser by virtue of what he had already paid, and also trustee of the remainder of the estate to the extent of allowing him to continue to remain in possession, make the stipulated improvements, pay the rest of the instalments as they fell due until the entire beneficial interest had passed to him, and then to convey to him the title for the land. So in *Rose* v. *Watson,* where the purchaser was held entitled to cancel the sale on the ground of misrepresentation and to have the instalments which he had paid before he repudiated the contract refunded to him, the result expressed in terms of trusts, was to find that the vendor had

[6] At p. 13.

[7] (1915), A. C. at 326.

[8] (1913), A. C. at 319; and see *Steedman* v. *Drinkle* (1906), 1 A. C. 275.

not been a trustee of the estate, but merely one for the amount of the purchase-money received on account of the purchase. The trust having failed of its object the money had to revert to the source from whence it came.

But the rest of Sir George Jessel's description in *Lysaght* v. *Edwards* of the position of a vendor while the contract of sale continues executory would appear still to hold good. "In other words," he proceeds, "the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is a person without beneficial interest) and a mortgagee, who is not, in equity (any more than a vendor) the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, 'either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, 'either pay me the purchase-money or lose the estate.'"[9] There is nothing here to conflict with what Sir Thomas Plumer says in *Wall* v. *Bright,* when he speaks of a vendor as "one who is partly the owner, who has the legal, and partly the beneficial estate"; and this beneficial estate is described in *Shaw* v. *Foster*[10] as "a personal and substantial interest in the property." Sir Thomas Plumer particularizes as to the extent of the vendor's beneficial interest by mentioning some of the limitations on that of the purchaser. "The purchaser," he continues, "is not entitled to possession unless stipulated for. . . . If the purchase-money has not been paid the purchaser cannot cut timber on the estate";[1] for, "the equitable owner must not change the character of the security which the vendor has for his unpaid purchase-money."[2]

[9] At p. 506.
[10] (1872), L. R. 5 H. L. 321.
[1] *Wall* v. *Bright, supra* at 503 and 502.
[2] *Allen* v. *Inland Revenue Commissioners* (1914), 2 K. B. at 333.

To focus these authoritative opinions in a sentence or two: The relation between a vendor and purchaser is determined partly by the conditions of the contract and partly by the extent to which the contract has been performed. When the purchase-money is payable in instalments each payment transfers a proportionate degree of beneficial ownership to the purchaser, the remainder still residing in the vendor. If the contract allows the purchaser immediate possession and the right to cut wood his beneficial ownership is so much enlarged and the vendor's proportionately reduced. When the contract has been completely performed on the purchaser's side, and he is able to claim specific performance, this fact ascertains or establishes the correlative fact that the vendor has become trustee of the whole estate for the purchaser to whom the full beneficial interest has passed leaving the vendor a naked or bare trustee with nothing but the legal title. But if at any earlier stage in the transaction the respective rights of the parties have to be determined these rights will depend upon the degree to which the contract has been performed. If, for example, the purchaser makes no payment after the first and time is of the essence of the contract, and there is a condition for forfeiture in case of non-payment, though he may recover his money in so far as he is relieved from forfeiture as a penalty, yet he cannot get specific performance;[3] the vendor not being a trustee of the estate but only of the purchase-money. For the same reason, when a purchaser can rescind the sale he is entitled to a refund of what he had paid up to the date of rescission, and has a lien on the property for this amount;[4] and since it is impossible to have a lien on what belongs to oneself the property, or the greater part of it, must have belonged to the vendor all along. Again, to take a third illustration, when a condition making time of the essence has been tacitly waived by extending the date of payment of an instalment, and the purchaser makes the payment a few days later than the extended date, he is entitled to specific performance,[5]

[3] *Steedman* v. *Drinkle* (1916), A. C. 275.

[4] *Rose* v. *Watson, supra.*

[5] *Kilmer* v. *B. C. Orchard Lands, supra.*

and the vendor has to hold the estate subject to the terms of the contract of sale, his interest consisting in the right to be paid the remaining instalments, to cancel the contract on failure by the purchaser to perform it, to the improvements (if the contract so provides), and to retain the legal title until the contract is no longer executory on the purchaser's side; all of which constitute a substantial beneficial personal interest in the vendor. And there are circumstances in which the purchaser may be regarded as never having been the owner of the land.

Applying these conclusions to the facts in *Grace* v. *Kuebler* where the purchase price was $21,600, of which the purchasers had only paid $4,600, and had four years in which to liquidate the balance at the time when the assignment of the agreement of sale was made to Grace, it is impossible to accept as correct a view which regards the vendors under such circumstances as having parted with their beneficial ownership and as having "nothing left but the bare legal title." They had a very large and substantial interest in the land sold when they entered upon their transaction with Grace. In fact the land was still theirs for nothing had occurred entitling the purchasers to be considered the owners of it.

The nature of that transaction demands attention because it was described as "a mere assignment of a debt," and the vendors were held not to have had the power to give a transfer of the land to the assignee of the contract of sale with the assignment. It is quite clear, however, from the facts of the case that Grace had something very different from an assignment of the purchase-money owing by the purchasers. He had an equitable mortgage of the vendors' entire and beneficial interest in the land. He had lent them $20,000.00 on several securities of which this equitable mortgage was one. It was given in the form of an assignment of the contract and a transfer of the land. This form of equitable security for a loan is a common enough one in the West, and should any attempt be made by the lender to take advantage of the *prima facie* absoluteness of the transfer to the pre-

judice of the debtor the courts will enforce against him the actual relation between the parties.[6] The vendor had every right to create this security, for, when an agreement of sale has been entered into, "either party to the contract may lawfully assign over his beneficial interest therein . . . and this is the case whether the assignment of the benefit of the contract be made for the purpose of absolutely transferring the assignor's whole interest or of securing some lesser or other advantage to the assignee such as the repayment of money lent."[7] But not only can the contract be assigned as a security; the land can be mortgaged, witness the facts in *Rose* v. *Watson*. Nor do the rights of a vendor stop at the giving of a mortgage. He can sell the land and convey the title to the purchaser as had been done in *Whitbread & Co. Ltd.* v. *Watt*,[8] the purchaser having in turn mortgaged the property. The test of the validity of such or any dealings of the vendor with the property is interference with the rights of the purchaser under the contract of sale. He can do nothing to their prejudice,[9] but outside of that there are apparently no restrictions on his powers. He is not under any obligation to keep himself in a position personally to give the purchaser title; it is sufficient if he does not place anyone else in a position to refuse to do so as, for instance, a *bona fide* second purchaser or a mortgagee of the property without notice of the earlier sale. One can hardly imagine a court sustaining the plea of a purchaser that the property afterwards transferred to a second purchaser for value, with knowledge of the prior sale, and notice to the first purchaser to pay the balance of the purchase-money to the new owner, ought to be re-transferred to the original vendor simply because the latter was the person to whom he, the first purchaser, had first looked to for a transfer or conveyance of the title. A mortgagor might as reasonably object to an assignment of the mortgage with notice to pay the debt to the

[6] Perdue, J.A., *Williams* v. *Box*, 19 M. L. R. at 588; *Wallace* v. *Smart*, 22 M. L. R. 68; *Short* v. *Graham*, 7 W. L. R. 787.

[7] Williams *V. & P.* (2nd ed.), vol. i., p. 568.

[8] (1901, 1 Ch. 911; (1902), 1 Ch. 835.

[9] Turner, L.J., *Hadley* v. *The London Bank of Scotland (Ltd.)*, 3 De G. J. & S. at 70; Williams *V. & P.* (2nd ed.), vol i., p. 564.

assignee. And it has to be remembered that anyone who buys land under the Acts can protect himself completely against every possible transaction of the vendor by registering a caveat. If such a one comes into court without having availed himself of this simple means of getting absolute security for his rights under his contract he starts with an immense handicap since he enters self-convicted of gross negligence.[10]

[10] *Agra Bank* v. *Barry*, 7 L. R. (E. & I.) App. at 156.

CHAPTER VIII.

THE CAVEAT.

The original Torrens Title Act, the Real Property Act of South Australia, provides that "any . . . beneficiary claiming under a will . . . may lodge a cavêat";[1] and the provision indicates the source from whence the idea of the caveat has been drawn. It has been suggested by the rules and practice of courts of probate. The procedure of such courts enables the claimant to an interest in the estate of a deceased person under a will to lodge a caveat with the object of preventing the issue of a grant of probate while the caveat stands. The caveat is a notice in writing to the officers of the probate registry that nothing is to be done in reference to the estate of the deceased person unknown to the caveator. The party whose grant is stopped, and who intends to proceed, has to issue a "warning" notice to the caveator to enter an appearance within a stated time and declare his interest. The caveator can then elect to withdraw his caveat, or to enter appearance, or he can apply to the court for an extension of time, or do nothing at all. In the last case the grant will issue on proof of the "warning" having been given and no appearance entered; while, if the caveator appears and an agreement between him and the applicant for probate is not reached, the latter can bring an action to dispose of the caveator's claim. In fact a caveat is often entered merely as a preliminary to such an action.[2]

Most of these characteristics have been reproduced in the caveat used under the Australian Torrens Acts but others have been added through the necessity imposed by the differences between the incidents of probate and those of registration of title to land. The Western Canadian Acts follow pretty closely those of Australia. Not only a person claim-

[1] Section 191, Hogg, p. 378.

[2] Tristram & Coote *Probate Practice* (15th ed.), p. 281, *et seq.*

ing to be interested under a will,[3] but generally anyone alleging any sort of right to an interest in land can file a caveat with the registrar of the registration district in which the land is situated.[4] The caveat is a written notice from the caveator to the registrar to whom it is addressed that nothing is to be done in reference to the land described in the caveat to the prejudice of the caveator's claim. The registered owner whose power of dealing with his property is thus restricted and who wishes to recover his freedom of action is empowered to give the caveator notice to show cause why the caveat should not be withdrawn; or he can request the registrar to notify the caveator that the caveat will be removed within a given period unless the time so limited is extended by order of a court; or he can call on the caveator to take proceedings in court before a set date to substantiate his claim. The caveator may withdraw his caveat; or proceed to establish his right; or he can make application in the proper quarter for an extension of time; or, lastly, he is free to take no action whatever. If he does nothing the caveat will lapse and be removed, while, if he goes on to enforce his claim, the procedure created by the Acts is open to him.[5] And, since a caveat may be used alternatively with a *lis pendens,* it can be filed simply as a preliminary to an action when a right to land is in dispute.[6]

The Real Property Act of South Australia adheres fully to the end served by entering a caveat in a probate registry in that it enables a caveator to prevent altogether any dealings with the land in which he claims an interest. In this it is followed by the Acts of Queensland and Tasmania. The corresponding statutes of the other states and the Land Transfer Act of New Zealand do not go so far; only permitting a caveator to prohibit dealings with the estate or interest claimed. Further, and as an alternative to this

[3] Alta. 84. This enactment appeared for some years in all the Acts, but has since been dropped from those of Manitoba and Saskatchewan in favour of the general expression "interest in land."

[4] Man. 138; Sask. 128; Alta. 84.

[5] Man. 138, 139, 142, 146, 150; Sask. 128, 135, 136, 137; Alta. 84, 88, 89. 91, 90.

[6] Man. 153, Schedule L; Alta. 98.

right of prohibition, the last mentioned acts enable a caveator to compel notice to himself of any dealing with his alleged interest; and under all the acts he can confine his power of interference merely to directing the registrar to make later dealings subject to his interest.[7] The Acts of Western Canada diverge yet further from probate law and practice. They limit the choice of the caveator to the first and third of the courses open to him in most of the Australasian jurisdictions. Here a caveator can "forbid" the registration of any person as owner or transferee of the estate or interest which he alleges himself entitled to, or the registration of any instrument affecting that estate or interest, and this either altogether or subject to his claim;[8] or, he can insist that "no registration of any transfer or other instrument affecting the said land (i.e., the land in which he claims an interest) and no certificate of title to such land shall be granted, until such caveat has been withdrawn or has lapsed as hereinafter provided, unless such instrument be expressed to be subject to the claim of the caveator as stated in such caveat."[9]

It is apparently the custom in Australia to speak of a caveat as filed and not as registered, because it does not pass or create an estate or interest in land.[10] All the Australian Acts refer to the entering of a caveat as "lodging" it; none of them give the expression any special meaning; and three of them (amongst which that of Victoria which served as the model for the Real Property Act of Manitoba) direct the registrars to endorse memorials of all caveats on the certificate of title for the lands interests in which are claimed.[1] Under these latter acts, therefore, it would seem that although registration is not defined in them as the endorsement of a memorial of an instrument on a certificate of title, yet, in point of fact, caveats are registered, since certain particulars of them are entered on the registers;[2] and

[7] Hogg, pp. 209, 295, 443, 453, 632.
[8] Man. 138; Alta. 84.
[9] Sask. 128.
[10] Hogg, 1040.
[1] *Ibid.*, 378, 544, 633.
[2] *Infra.*

consequently the distinction between filing and registration would not appear to serve any useful purpose. The reason for the same distinction obtaining here is the *ipsissima verba* of the Acts. A caveator is empowered to "file" his caveat.[3] The word does not receive definition in the Act of Manitoba, but whatever it signifies it cannot denote the same thing as registration, the meaning of which is explicitly determined.[4] Possibly the expression should obtain the same interpretation as is given it in the Acts of Saskatchewan and Alberta, namely, entry in the day book.[5] These Acts, after authorising anyone interested in land to file a caveat, proceed to do what the Manitoba Acts omits. They direct registrars to enter a memorial of every caveat filed with them on the certificate of title for the land described in the caveat.[6] When this has been done the caveat is registered. But in spite of the registrars' lack of express authority to enter memorials of them in the register caveats invariably are registered in Manitoba. Usage, when long followed and not in itself unreasonable, can be allowed to interpret the intention of a statute. It is clear, also, that the Manitoba Act contemplates actual registration of caveats for by subsection (j) of section 78 a certificate of title is made subject by implication to "caveats affecting the land registered since the date of the certificate."

If, then, language is to correspond with fact there can be no doubt that, whatever the custom in Australia and the justification for it and notwithstanding the expressions used in the Western Canadian Acts, a caveat should be spoken of here as registered and not as filed. It is a registrable instrument and is registered like any other instrument possessing capacity for registration.

The prime function of a caveat is to secure priority for the caveator's interest, if a valid one, over all later registered interests and all interests of earlier date but unregistered. The Acts endow it with this function in express words.[7]

[3] Man. 138; Sask. 128; Alta. 84.

[4] Man. 90.

[5] Sask. 2, 12; Alta. 2 (*m*).

[6] Sask. 133; Alta. 86.

[7] Man. 151; Alta. 97. In Saskatchewan a caveat receives priority by virtue of its being a registrable instrument, and the section giving such instruments priority according to date of registration (s. 63).

The terms of the Real Property Act of Manitoba are the amplest. Registration of a caveat is to give not only the instrument itself but also the "subject matter" on which the caveat is based the same priority as the registration of a registrable instrument would confer on such an instrument. Possibly the expression "subject matter" was inserted to meet the case of a transaction lacking documentary evidence or complete documentary proof of its having been entered into. However that may be, the instrument, the transaction, and the estate or interest claimed, take priority over all subsequent and unregistered claims or interests without exception. As was said in *Gibbs* v. *Messer*,[8] "it does appear to have been the intention of the Act (of Victoria) to confer the same kind and degree of security upon all persons who, transacting in reliance on the Register, acquire either proprietary rights or mere interests in lands in good faith and for valuable consideration. Their Lordships assume . . . that the statute makes no distinction between these two classes of proprietors." It is to get the security which priority affords him against interests in the same estate as he claims to have acquired registered after his caveat and against similar unregistered interests of an earlier date than his own that a caveator registers his caveat.

This important and indeed largest aspect of the effect of a caveat has not received much recognition. Its form and phraseology and even the derivation of its name have attracted far more attention; the last being often no guide at all to the meaning of a word in the language into which it has been adopted. A caveat has been said to be a "warning"[9] — let him beware. Primarily it is nothing of the kind. A caveator registers his caveat to secure priority for his estate or interest not to warn other people of its existence. Their transactions are no concern of his and it is nothing to him whether they learn of his transaction or not. A registered mortgage or lease is as much of a warning as a registered caveat, but it has not yet occurred to anyone to apply

[8] (1891), A. C. at 254.

[9] *Stephens* v. *Bannan*, 6 A. L. R. at 427; *Royal Bank of Canada* v. *Banque d'Hochelaga*, 8 A. L. R. at 129; *Grace* v. *Kuebler* (1917), 1 W. W. R. at 1215.

that description to either of them. A caveat entered in a probate registry is not a warning. The form runs "Let nothing be done in the estate of A.B., &c., unknown to C.D., &c., having an interest." It is the person whose grant is thus stopped and who intends to proceed with an application for probate who gives the "warning." He "warns" the caveator to enter an appearance within a stated period and disclose his interest.[10] The nearest approach to a warning under the Acts is, therefore, the notice given by the registered owner to the caveator to show cause why the caveat should not be withdrawn, or else the notice of lapse issued by a registrar at the registered owner's instance.[1]

A caveat has also been said to be "nothing more than a caution as it is called in some similar acts."[2] The Land Transfer Act of Ontario and the English Land Transfer Act are two such. They provide that "any person interested under any unregistered instrument or interested as a judgment creditor or otherwise howsoever, in any land or charge registered in the name of any other person may lodge a caution with the registrar to the effect that no dealing with such land or charge be had on the part of the registered proprietor until notice has been served on the cautioner."[3] After a caution has been lodged a registrar cannot register any dealing with the land until he has served notice on the cautioner that his caution will cease to have effect within the time limited in the notice.[4] But the caution does not secure priority for the cautioner's estate or interest as a caveat does for the estate or interest of the caveator, because equitable rights still rank according to date of creation and not according to the dates upon which cautions having reference to them are lodged. If priority is desired for the interest claimed it is only to be got by filing a priority notice which cannot be done by the cautioner of his own motion. He has to obtain it from the registered proprietor.[5]

[10] Tristram & Coote, *Probate Practice* (15th ed.), pp. 231 and 290.

[1] Man. 146; Sask. 136; Alta. 91.

[2] *Stephen* v. *Bannan*, 6 A. L. R. at 418.

[3] R. S. O. 1914, c. 126, s. 72; Land Transfer Act, 1875, s. 53.

[4] *Ibid.*, s. 73; *Ibid.*, s. 54.

[5] Brickdale & Sheldon *Land Transfer Acts* (2nd ed.), p. 38, Rule 117.

Other descriptions of the caveat are "a prohibition to the registrar,"[6] and a "species of injunction."[7] These seem to do little more than multiply synonyms. In point of fact neither the phrasing nor the form of the caveat is of first or of much assistance in arriving at its essential effect. This is to be found in the sections of the Acts by virtue of which its registration secures priority for the estate or interest claimed. That the caveat is cast in the mould of a prohibition or injunction is of small importance. In reality both its form and the terms of the sections of the Acts by which a caveator is empowered to file a caveat, considered by themselves, are somewhat misleading. A caveator is given the right to forbid the registration of an instrument which might prejudice his alleged estate or interest by filing a written forbiddal with the registrar, after which his claim is to have priority from the date of filing (or registration) of the forbiddal. This ordering of ideas is somewhat in the nature of putting the cart before the horse. A caveator is really given a right to secure priority for his interest by registering particulars of it. The difference between the object and the result of entering a caveat in a probate registry and the object and result of filing a caveat in a land titles office has been overlooked. A person who does the former aims and can aim only at securing notice to himself of proceedings proposed to be taken in regard to the estate of the deceased; and he achieves this end by forbidding the doing, unknown to him, of anything affecting the estate. But he neither discloses his interest nor obtains priority for it. His prohibition and the notice or "warning" which must be given him are consequently the main features of the situation. The case is quite otherwise with a caveator using the kind of caveat authorised by the Acts. He receives no actual notice of subsequent registered interests, and their registration is not constructive notice; nor is his caveat registered with any intention or desire to get notice of them. But he obtains priority for his claim, and he has, or should have, to set it out in the completest manner possible. It is

[6] *Stephens* v. *Bannan*, 6 A. L. R. at 427.

[7] *Royal Bank of Canada* v. *Banque d'Hochelaga*. 8 A. L. R. at 135.

solely in order to secure this priority that a caveat is registered at all. The form of caveat prescribed in the Acts is merely an enlargement of the form employed in probate registries and its phraseology fails to give effect to the intention and effect of a caveat under the Acts. Instead of forbidding registration it should claim priority. The direction that a later instrument is not to be registered "unless such instrument be expressed to be subject to my (the caveator's) claim" is superfluous in view of the fact that the priority enjoyed by a caveat necessarily entails on the later registered instruments subjection or postponement to the caveat if the claim be a valid one. In short, though formally a prohibition or injunction, a caveat is, in essence, an instrument the object of which is to secure priority for the estate or interest described in it.

It has also been said that a caveat "prevents the acquisition or bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator—at all events as it exists at the time when the caveat is lodged."[8] This fact, though generally speaking, perfectly true, does not differentiate the effect of a caveat from the effect of any other instrument which is registered. Registration of a mortgage, or of a lease, or of a writ of execution or certificate of judgment, works the same result. The titles of the mortgagee, the lessee, the execution or judgment creditor and the caveator, if his claim is a valid one, are all and equally indefeasible by any subsequent dealing or instrument; cannot be derogated from by any such instrument or dealing. It is not correct, however, to limit the protective capacity of a caveat to the moment of the caveat's registration. In the case of the usual agreement of sale, for example, making the purchase-money payable so much in cash and the balance in annual instalments, the purchaser, after he has made the cash payment, has an interest in the land sold to the extent of that payment; and as the remaining instalments are paid so his interest increases in proportion.[9] If he registers a caveat founded on the

[8] *McKillop & Benjafield* v. *Alexander*, 45 S. C. R. at 583.

[9] *Rose* v. *Watson*, 10 H. L. C. 671, *supra*.

agreement the transaction is protected from start to finish.[10] A caveat thus protects—prevents any derogation from—the caveator's interest not only as it stands at the time when the caveat is registered but at every successive increase of its right up to its maturity.

It follows from what has been said so far that a definition of a caveat making any pretence to accuracy must include a statement that a caveat is a registrable instrument which, when registered, secures priority for the estate or interest claimed, if a valid one, in precisely the same way as would have been done had the interest been created by a registrable instrument registered on the same date as that on which the caveat was registered.

Registration confers on the person who has registered an instrument indefeasible title to the estate, interest or right described in the instrument, whether a proprietary right or a mere interest in land;[1] but it is clear from the proviso in the partial definition just given of a caveat that registration of a caveat does not confer on the caveator indefeasible title to the interest described in the caveat. To render the definition complete, therefore, it is necessary to ascertain to what registration of his caveat gives the caveator indefeasible title.

The degree or character of the indefeasibility of title acquired by the person registering an instrument varies with the character of the instrument which is registered. In the cases of a transfer of the fee simple, which results in the transferee becoming registered owner and receiving a certificate of title, the indefeasibility of the title is absolute in that it cannot ordinarily be defeated save by the act of the owner himself. It is also absolute in respect of the owner's estate. The interest of a mortgagee, evidenced by his registered mortgage, and consisting in the right to hold the mortgaged land as security for the loan and in the other rights given him by the Acts and possibly by the mortgage itself, is defeasible primarily, not by his own act but by the act of the mortgagor in repaying the loan. If, for example, the mortgagee is absent from the province and without a representative in

[10] *Cooper* v. *Anderson*, 22 M. L. R. 428.

[1] *Gibbs* v. *Messer*, *supra*.

it the mortgagor can pay the amount of the loan into the provincial treasury and the treasurer's receipt enables him to clear the mortgage off his title.[2] But registration of a mortgage is never looked on as even prima facie evidence of the mortgagee's interest under the mortgage. No one supposes that its registration guarantees the validity of every clause and condition in it, or the amount secured under it, or even that any portion of the loan has actually been advanced. In registering mortgages registrars only concern themselves with their form and attestation, the description of the mortgaged property and the prima facie identity of the mortgagor with the registered owner. Outside of these details they register a mortgage for whatever validity it may prove to possess. They would do the same with a lease, the lessee's interest under which is, in the ordinary course of things, defeasible by mere effluxion of time, that is, by a cause independent of the act of either party to the contract. What, then, is the degree or character of the indefeasible title secured to a caveator when his caveat has been registered?

In the first place the title of a caveator, like that of a transferee of the fee simple who becomes registered owner, is defeasible by his own act, for he can withdraw his caveat[3] just as a registered owner can transfer to another his entire estate. It can also be defeated at the instance of the registered owner, since the latter is enabled either to summon the caveator to show cause before a court or judge against the caveat being removed,[4] or he can request the registrar of the land titles office in which the caveat has been registered to issue a lapsing notice.[5] Until one or other of these or similar[6] proceedings has been taken and prosecuted to a successful issue the caveat remains operative and the caveator's title secure.[7]

These incidents elucidate one right to which a caveator

[2] Man. 125; Sask. 120; Alta. 65.
[3] Man. 142; Sask. 137; Alta. 84.
[4] Man. 139; Sask. 135; Alta. 91.
[5] Sask. 136 (2).
[6] Man. 144; Sas. 136; Alta. 89.
[7] Sask. 136. In Manitoba and Alberta there is no express enactment on the duration of a caveat, but the statement in the text clearly seems implied.

secures indefeasible title. Indeed they do more; they define it. He acquires a right, not to be defeated save in the ways just indicated, to establish in a court of law his claim to the estate or interest described in his caveat. He had the right, of course, as against the party from whom he claims and against all others except a person who had dealt bona fide in reliance on the register, before his caveat had been registered; but now he can enforce it even against later registered interests acquired in good faith. It is not possible, however, entirely to separate this right of action from the rights constituting the caveator's estate or interest any more than it is possible to distinguish completely such a right of action from the action itself, that is, the procedure which enforces the right.[8] Just as much of a right of action consists of rights to take those very steps by which the end of the action is accomplished, so a caveator's right to prove and enforce his claim is but one of the collection of rights making up the whole of his estate or interest; and the character and form of his action can only be determined by reference to these other rights. Consequently it is impossible, even as a matter of pure juristic theory, to separate the registration of a caveator's right to establish his claim from registration of the estate or interest claimed. It is equally impossible in the face of the actual facts. The caveat itself, with the instrument upon which it is founded if there be one, forms part of the register just as much as a registered mortgage or a registered plan. The memorial of registration of a mortgage on, and the mention of a plan in, a certificate of title is a reference incorporating the one or the other with the certificate. In the same way the endorsement on a certificate of title of a memorial of the registration of a caveat incorporates with the certificate the caveat and the instrument on which it is based. Both thus are part of the register — are registered. That is to say, the equitable interest of the caveator is registered just as much as the legal or statutory interest of a mortgagee or lessee. But the degree of indefeasibility in his registered title to this equitable interest is very limited. Precisely as the whole interest of a mortgagee

[8] See Austin's *Jurisprudence*, vol. II., p. 765.

or lessee is not guaranteed through registration so that of a caveator is not guaranteed either. It is registered for what it may be worth. All that he is assured of is a right if his title is challenged to prove that he is legally entitled to the interest which he claims, and if the interest is established, to priority for it from the date of its registration through the instrumentality of the registration of his caveat. But, unlike the holder of any other registered interest, he can be served with notice to prove his claim within a given period failing which he loses both right and priority, unless both or either are restored to him by order of a judge.[9] Once his claim is established, however, the result is to give him the right to a legal or statutory title for his interest dating for priority from the date of registration of his caveat and indefeasible in degree according as he has proved himself to be entitled to a charge, a leasehold estate or the fee simple.

It is the *de facto* registration of the instrument founding a caveat which explains the words "registration by way of caveat" in the Alberta Act.[10] The expression has been subjected to a good deal of undeserved criticism. It has been called "obscure" and "enigmatic" and "cryptic"; and has been held incapable of being "interpreted as meaning anything more than registration of a caveat."[1] In reality it is neither obscure nor cryptic and means more than registration of a caveat. It refers to the registration of the caveator's equitable interest by means or by way of registration of his caveat. The memorial of the caveat on the register and the reference in the caveat to the instrument creating the equitable interest make both caveat and instrument part of the register — result in both becoming registered. The practice of insisting that a caveat is to be accompanied by a copy of the document evidencing the interest claimed is not uniform. It seems clear that a copy certified in some satisfactory way should invariably be attached to the caveat, for otherwise the register is not a complete record of title. But whether a copy be attached or not the instrument has

[9] Man. 148; Sask. 138 (2); Alta. 95.

[10] Alta. 97.

[1] *Royal Bank of Canada* v. *Banque d'Hochelaga*, 8 A. L. R. at 128.

been registered. It has also been said of these words "registration by way of caveat" that, "If, as applicable to the present case (of a caveat based on a mortgage), they are to be interpreted as meaning 'registration of a mortgage by means of filing a caveat based thereon' then what, one may ask, becomes of the provisions of the Act which render it necessary to produce the certificate of title before a mortgage can be registered at all? If he can keep his mortgage in his pocket and merely file a caveat which will give him all the advantages of filing his mortgage, not only with respect to subsequent transactions, but with regard to all prior unregistered instruments or securities, then it simply amounts to this, that the registration of a caveat based on the mortgage is equivalent to registration of the mortgage and the latter ceremony is entirely unnecessary."[2] Registration of such an equitable or non-statutory mortgage is not the same thing as registration of a legal or statutory one. Registration of a mortgage in the statutory form creates a legal or statutory mortgage with an indefeasible title which nobody can call on the mortgagee to prove, and which cannot be lost save in the one way contemplated from the outset, namely, through repayment of the debt. On the other hand, registration of the same mortgage by way or by means of a caveat leaves the mortgage non-statutory or equitable, the mortgagee only acquiring through registration in this form a right to prove that he has a valid equitable mortgage entitled to be converted into a legal or statutory one with priority from the date of registration of his caveat; a right which anyone interested in the property can give the mortgagee notice to establish in a court of law within the time limited in the notice failing which the mortgagee's right to priority will be lost. Another important difference lies in the fact that a mortgagee with a registered mortgage can enforce his security on default in the manner prescribed by the Acts without more ado, whereas an equitable mortgagee with a registered caveat cannot. He must first convert his equitable mortgage into a legal one.

A fuller definition of a caveat can now be attempted. It

[2] *Ibid.*, at 129.

is a registrable instrument which, when registered, secures priority for the estate or interest claimed, if valid, in precisely the same way as would have been done had the interest been created by a registrable instrument registered on the same date as that on which the caveat was registered; and confers on the caveator title, indefeasible save in the manner indicated by the Acts, to a right to prove the validity of his interest if challenged.

Although the subject of registration as notice has already been considered it will bear further reference here, seeing that a caveat has frequently been spoken of as constructive notice of the caveator's claim to everyone dealing with the property after the caveat has been registered. The rule that registered instruments are to take priority according to their respective dates of registration completely excludes the doctrine of constructive notice from any place in a discussion concerning rights to precedence between registered instruments, or between such instruments and instruments not registered, when there is no question of fraud. This conclusion can, however, be briefly demonstrated in a different manner to that already employed. The equitable doctrine of constructive notice has no existence apart from the equitable rule that a bona fide purchaser for value without notice of an outstanding estate acquires valid title to the property sold; and a successful claim by a purchaser for the application of the rule results in a vendor being able to give a better title than he has himself. This rule of purchase for value without notice has no meaning, however, in a court of law because at common law a vendor never can give a better title to real property than he actually has.[3] Regard being had to registered interests, the Acts, like the common law, know nothing of the purchaser for value without notice; for, when such interests exist, a vendor cannot give a better title than he really has to any interest which he may subsequently alienate. His estate consists of the estate of which he originally became registered owner less the estates or interests or rights afterwards carved out of it by the instruments creat-

[3] Ashburner *Principles of Equity*, pp. 67 and 68.

ing the registered interests; and he can convey a valid title to this remainder only since the title to each registered interest is indefeasible. The doctrine of constructive notice, therefore, has no application to registered estates and interests or to the instruments creating them. Again, regard being had to unregistered interests, a vendor's estate in the eyes of the Acts is the estate as shown on the register no matter what estates or interests he may have parted with to persons who have not registered the instruments which he has executed in their favour; and it is this estate which a purchaser acquires who transacts bona fide in reliance on the register. Consequently, as against unregistered interests, a vendor can give a better title than he actually has and the Acts thus follow the equitable principle of purchase without notice. But the purchaser does not get this better title because he has not received notice, constructive or actual, of the unregistered interests, but because the Acts provide that registration of his transfer is to give him a title indefeasible by constructive notice; indefeasible, also, by actual notice unless to register the transfer in the face of such notice of an unregistered interest would amount to fraud on his part, which is merely not to except transactions in land from the operation of a universal principle of law.

To return to the definition of a caveat. Its registration confers priority on the interest claimed from the time of registration. The interest enjoys this priority as long as the caveat remains on the register and to the entire exclusion of other registered interests, *Cooper* v. *Anderson*,[4] a decision the importance and effect of which does not seem to have been fully appreciated. The caveator (a company) had bought the property from another company which was registered as owner but in reality held as trustee for the previous registered owner whose title was alleged to be vitiated by fraud. The party defrauded brought the action, *inter alia*, to set aside the sale and had registered a *lis pendens;* notice of the action, to which the caveator had been made a party, being the first notice to it of the alleged fraud. The plaintiff admitted the caveator's ignorance of the fraud and

[4] 22 M. L. R. 428.

apparently contemplated conceding a lien on the property for the instalments of purchase-money paid. Cancellation of the contract of sale was refused on the ground that section 151 (then 143) of the Manitoba Real Property Act gave the same priority to a registered caveat as it did to any registered instrument; and the caveat having been registered earlier than the *lis pendens* and before notice of the fraud had been received by the caveator the contract of sale remained unaffected by the notice. "In short," runs the judgment, "I take it that the contract is protected throughout, from its inception to its termination by completion or otherwise." In other words, just as section 99 (then 91) "means nothing if it does not mean that an innocent person may safely contract or deal with a registered owner without inquiry"—need not look further before him than the registered owner's certificate of title, i.e., the register — so, once he has registered a caveat based on his contract, the contracting party need not look behind, need not pay any further attention to the register — watch the register during the currency of the contract for the possible registration of interests acquired in the property after his own. His contract remains protected by the caveat from start to finish. To borrow a military metaphor, registration of a caveat constructs a communication trench between the pocket of the purchaser and that of the vendor along which the instalments of purchase-money can travel in safety and, finally the transfer from the vendor to the purchaser; a trench impregnable to every kind of legal shell lighter in calibre than actual notice of another claim, registered (for registration is not notice) or unregistered, to ignore the existence of which would be against conscience, would be tantamount to fraud. A registered mortgage provides an exact analogy. Its registration secures priority for the mortgagee's right to repayment of the loan and enforcement of his security on default; and, when more than one property is covered by a single mortgage, for his right to release any one of the mortgaged properties without regard to the possibility of a second mortgage having been registered when actual notice of the second mortgage has not been given him by the second mort-

gagee. But registration of a mortgage also protects the mortgagor's right to pay the debts to the mortgagee, even if third parties have a claim upon it. He need not concern himself with the mortgagee's dealings with the mortgage for only notice to himself of them,[5] or of a judgment or writ of execution against the mortgagee, can interrupt the passage of the mortgage moneys from him to the mortgagee as they become due and are paid. No case better illustrates the complete security secured to a transaction by the priority which registration of the instrument evidencing the transaction confers on it than *In re O'Bryne's Estate,*[6] a case on the Irish Registry Act, which gives registered instruments priority according to date of registration, and which is worth quoting at some length because the Irish chancellor discusses fully the immunity of the holder of a prior registered interest from interference by the holder of one registered later; the necessity lying on a subsequent encumbrancer of giving actual notice of his interest to the holder of the prior encumbrance; the fact that registration of an instrument is not notice of it; and because the judgment lays down that nothing necessarily involved in giving full effect to an earlier registered interest, though done after the registration of the later acquired interest, can be considered a dealing with the property subsequent to the registration of the later acquired interest. Further, a similar view obtains in Australia.[7]

The owner of landed property had mortgaged it to his bank in order to secure past and future advances, no limit being placed on the amount of the advances. The mortgage was registered. The mortgagor then executed a second mortgage in favour of another mortgagee and this second mortgage was also registered. The second mortgagee did not give the bank notice of his security. After its registration and in entire ignorance of its existence further advances were made by the bank to the mortgagor, and the second mortgagee claimed priority for his mortgage over the amount of these advances. His claim was rejected. The lord chancellor said:—

[5] Coote *Law of Mortgages* (7th ed), pp. 53 and 1238.
[6] 15 L. R. Ir. at 375, *et seq.*
[7] Hogg, 963.

"Now in considering the question before us, it is well to bear in mind that the validity of deeds to secure future advances has never been questioned. The law allows such securities to be created, and, when created, gives effect to them. The mortgagor cannot redeem except on payment of the further advance, and the mortgagee can sell to realize the sums so advanced. Being good against the mortgagor, they are equally good against and binding on a second mortgagee, or other person deriving through the mortgagor, unless some special ground exists for placing him in a more favourable position than the person through whom he claims. Prior to the case of *Hopkinson* v. *Rolt*,[8] a case which, in my opinion, has an important bearing on the question before us, and to which, therefore, I refer—it would appear to have been considered that even when the first mortgagee makes an advance with full knowledge of the existence of the second mortgage, he would nevertheless be entitled to priority; but the House of Lords held in that case that it was otherwise, and that the first mortgagee having notice of the second mortgage when he makes his further advance, must be postponed to the second mortgagee. But the case proceeded on the ground of notice. It was on the ground of notice, and of notice alone, that the priority of the first mortgage was interfered with; and, as the ground upon which Courts of Equity interfere, when notice is proved, with what otherwise would be the rights of the party, is, that it is necessary to do so in order to prevent fraud, it follows that the ground on which the first mortgagee was postponed was that it was considered that his making, voluntarily and without any legal obligation on his part to do so, a further advance when he knew of the second mortgage, and so knowingly and deliberately ousting, or endeavouring to oust, the right acquired by the second mortgagee, would be, if it were allowed to prevail, a fraudulent act, and as such could not be allowed to stand.

"Now if this be so, and if, independent of the effect of the Registry Acts, the security of the first mortgagee in respect of his further advance is good as against the second mortgagee, except in cases where his assertion of it would be

[8] 9 H. L. Cas. 514.

a fraudulent act, let us see whether the Registry Acts make any difference.

"It was argued on behalf of the appellants that if, in England, notice be sufficient to prevent the first mortgagee from making further advances, registration in Ireland should be deemed to have the same effect, and to be effectual for the purpose of fixing the priorities of the parties. But is this so? No doubt registration is for many purposes, under the express provisions of the legislature, attended with the same effect as notice; but still it is not the same thing, and the present case is a very good example of the difference between them. Notice, where it exists, by bringing home to the mind of the first mortgagee the existence of the second mortgage, would render his conduct fraudulent in making an advance, and then endeavouring to oust the second mortgagee; but it would be absurd to argue that the fact of the second deed being registered, when the first mortgagee is wholly ignorant both of its existence and registration, as also probably of the very existence of the second mortgagee, could be held to affect his conscience so as to render his conduct fraudulent by interfering with rights of which he was not aware.

"I am very clearly of opinion, therefore, that mere registration cannot, for the purpose of postponing the first mortgage be held to be equivalent in its effect to notice."

It had been argued that the advances made after the registration of the second mortgage constituted a "disposition" or dealing with the property and consequently, since dispositions or dealings had priority according to their dates of registration, the second mortgage, having been registered, had priority over the advance. To this plea the chancellor replies:—

"I cannot, however, accede to that argument. The disposition of the estate to the Bank was effected by the deed executed on the 13th February, 1878, and there was no other disposition of it to them; and the case of *Credland* v. *Potter*[9] . . . does not appear to me to be in point. There the deed relied on did not purport to secure further

[9] L. R. 10 Ch. App. S.

advances. It was merely given to cover the present advance. Here the deed was given to secure future advances and the Bank claims by virtue of the deed itself. There the first mortgagee did not claim in reality on the foot of his deed, but by virtue of the equitable doctrine of tacking, which is a very different thing; and it was held that the second mortgagee, whose deed was registered, was entitled to priority, not over money advanced on the security, and within the very terms of the first deed, but over money not advanced in pursuance of the first deed. If the first deed had been to cover future advances, the result would, I apprehend, have been different.

"The Registration Acts must be taken as applying to deeds to secure future advances as well as to others. There is nothing in the Acts excluding such deeds from their operation, or preventing such deeds from sharing in and enjoying the advantages and priorities they confer. This being so what is there which can be registered except the original deed itself? The making of the advance across the Bank counter, or by placing a sum of money to the credit of the mortgagor, is not a transaction which can be registered. It was said that the Bank might insist on execution by the mortgagor of a memorandum, and then register it; but in such case the security would be created in reality, not by the original deed but by the memorandum; whereas, in reality, the security which is acquired in case of a deed to secure future advances, for such future advances, is derived from the deed itself, and when registered the Registry Act does not detract from its force or efficacy as against persons claiming through the mortgagor, and who cannot prove notice so as to affect the conscience of the first mortgagee.

"In my opinion, therefore, the registration of a subsequent mortgage, the first mortgagee having no notice of it, does not affect or prejudice the validity of the first mortgage, and does not prevent it from operating as a security for such further advances as against the mortgagor and those deriving under him. . . . And it is to be remembered that if there be a loss in this case, the second mortgagees have themselves to thank for it. When taking their security it is to be sup-

posed they took the common precaution which every mortgagee takes before his deed of mortgage is executed, viz., to search the registry. They would have found there, and most probably did find there, the memorial of the Bank mortgage, which on the face of it, states it is given to secure future advances, and they could then have served notice on the Bank, and so prevented them from making further advances. They could have done this but they did not and they cannot now turn round and say that having neglected so very obvious a precaution, the Bank shall suffer because they (the Bank) did not adopt the unusual, and, as I consider it, unnecessary precaution of having fresh searches made before each cheque drawn by Mr. O'Byrne was honoured by them."

Once his caveat has been registered a caveator has no further concern with the register. If he is a purchaser paying the purchase-money in instalments he is under no obligation to search the register in order to ascertain whether any interests have been entered in it subsequent to his own. He is as free as a mortgagor to ignore the very existence of the register. As was said by Lord Blackburn in *Bradford Banking Co.* v. *Briggs,*[10] when deciding against the claim of a second mortgage to priority over advances made by the first mortgagee after the creation of the second mortgage, the first mortgage securing future as well as past advances: "The first mortgagee is entitled to act on the supposition that the pledgor, who was the owner of the whole property when he executed the first mortgage, continued so, and that there has been so such second mortgage or pledge until he has notice of something to show him that there has been such a second mortgage: but as soon as he is aware that the property on which he is entitled to rely has ceased so far to belong to the debtor, he cannot make a new advance in priority to that of which he had notice."

The provisions of the Yorkshire Registry Act of 1884, as amended by the act of 1885, and the resultant practice are fully pertinent to the present inquiry. Under that Act a caveat is registered not by the grantee but by the grantor.

[10] 12 App. Cas. at 36.

The caveat sets out the name of the person on whose behalf it has been given and the length of time during which it is to remain in force; and any instrument executed in such person's favour, when registered, receives priority as though it had been registered on the date on which the caveat was registered. "Thus," says Halsbury, "a vendor or mortgagor can, by registering a caveat, guarantee the purchaser or mortgagee against further dealings with the property to his prejudice."[1] A similar practice prevails under the English Land Transfer Act. A purchaser can secure priority for his purchase by getting from the vendor and then lodging in the Registry Office a priority notice. The notice ordinarily holds good for fourteen days but can be renewed.

The effect of these conclusions may be summarised in a sentence constituting a definition of a caveat which may possibly be exhaustive. It is a registrable instrument whose registration, fraud apart, confers on the caveator a right, indefeasible save in the ways prescribed by the Acts, to establish the validity of his interest, if challenged, and which secures for that interest, if valid, absolute priority from the time of the caveat's registration over subsequently registered interests and all unregistered interests, whether of earlier or later date, in exactly the same way as would have been done had the caveator's interest been created by a registrable instrument and that instrument had been registered. If some of these characteristics had received attention in *Grace* v. *Kuebler*,[2] the most recent case on the caveat, it would seem that the decision on the main issue must have been different from what it was. The case was heard in three courts and it is necessary to recite the facts very briefly in order to bring out some salient features in them which went without any recognition.

Two men bought a section of land in Alberta for $21,600 under an agreement of sale, pursuant to which they paid $4,600 in cash, covenanting to liquidate the balance in a given number of annual instalments. In spite of the considerable sum involved they neglected to register a caveat to

[1] Laws of England, Vol. XXIV., par. 356.

[2] 34 W. L. R. 945: (1917), 1 W. W. R. 1213; (1917), 3 W. W. R. 983.

protect their interest in the land. Before the first instalment fell due the vendors offered to complete the bargain and transfer the title on immediate payment of a lump sum representing a considerable reduction on the balance of the purchase price then outstanding. Not having the money available the purchaser set about trying to obtain it. While they were thus occupied the vendors raised a loan of $20,000 from the plaintiff Grace on several different securities, two of which were an assignment of the agreement of sale and a transfer to Grace of the land sold. Grace did not register the transfer because it had been taken by way of security only and there might be no occasion, therefore, to use it; but he registered a caveat based on it. By this time the purchasers had got together most of the sum payment of which was to give them title and had a promissory note ready for the difference. The money and the note were handed over to the vendors in reliance on their promise to deliver the transfer in a few days. Then arose the opportunity for committing a fraud against the consequences of which to themselves the purchasers would have been protected had they registered a caveat. The vendors absconded with the cash, the note and the proceeds of the loan, leaving the purchasers without a transfer and the title to the land saddled with Grace's caveat. The dates of all these happenings have to be carefully marked. The agreement of sale was entered into on the 27th June, 1912; Grace's loan was made at the beginning of April, 1913, and his caveat registered on the 8th of the same month; the purchasers paid the balance of the purchase-money to the vendors after that date and discovered the fraud in the fall of 1913. Grace does not seem to have heard of the fraud until later and he only gave the purchasers notice of the assignment early in the following year.

One of the most obvious features about the transaction is the gross negligence of the purchasers in not registering a caveat to protect their interest in the property. "I say it would be an extraordinary thing," runs the judgment of Lord Hatherly in *Agra Bank* v. *Barry*,[3] "to allow the person

[3] 7 L. R. (E. & I.) App. at 156.

who in the first instance has been guilty of gross negligence in not registering the deed contrary to the words of the Act of Parliament (the Irish Registry Act which gives a registered instrument priority from the date of its registration) to obtain the advantage of priority over the person taking the subsequent instrument." The purchasers were, it is true, new-comers, of foreign extraction, little acquainted with the English language and entirely ignorant of the land laws of this country. But they had brought with them a large sum of money, for not only were they able to make the first cash payment of $4,600, but they could also afford to buy and pay cash for farm equipment and stock costing $3,400 more. This money must have been remitted through a bank, or a shipping or railway company, and if they felt they could not safely make inquiry anywhere else they might have concluded that a corporation to which they could confide the custody of the considerable sum which they had brought over might be trusted to inform them where to obtain competent legal advice in their purchase. Indeed, the omission to seek legal advice was of itself negligence.[4] They were not business men and had trusted someone who had proved unworthy of their confidence, but neither fact could enable them to escape the consequences of not having observed the proper usages of business.[5]

Grace brought a suit for specific performance on the ground that registration of his caveat was constructive notice to the purchasers of the assignment of the contract of sale to himself. The suit was properly dismissed. On their part the purchasers counterclaimed for a transfer clear of the caveat and their counterclaim was allowed. It is this part of the decision which seems impossible of acceptance as good law.

At the time of their negotiations with Grace for a loan, the vendors had a large and substantial interest in the land sold.[6] The purchasers had apparently been let into possession, but they still had to pay $17,000 out of a price of $21,600. The vendors could deal with their own interest as

[4] Maitland's *Equity*, 124.
[5] *In re Lord Southampton's Estate* (1880), 16 Ch. D. at 185.
[6] See previous chapter.

they chose, provided the purchasers' rights were not thereby prejudiced.[7] They could pledge or mortgage their interest; and that is precisely what they did. Wanting ready money they raised a loan of $20,000 on the security of the agreement of sale (with other securities) assigning the agreement and executing in his favour a transfer of the land to Grace, a common enough form of pledge or mortgage. But it was an equitable mortgage merely, and, while it remained such, was liable to be postponed to any other interest in the property as, for example, a writ of execution against the vendors which might subsequently be registered while the mortgage remained unregistered. So to protect himself against such an eventuality Grace very properly registered a caveat which he founded on his transfer. To have omitted this precaution would have been to exhibit the same inexcusable carelessness as the purchasers had already displayed. He did not, however, give the purchasers notice of the assignment. He was quite free to give them notice or not, either merely of the assignment or also to pay the instalments of purchase-money to him, and he elected not to. He had no intention of disturbing the existing relations between them and the vendors, but contemplated the continued payment of the instalments to the vendors as they became due and the vendors, in turn, paying the instalments over to him; so that, when the amount secured by the equitable mortgage had been refunded, the agreement and transfer could be returned to the vendors and the caveat withdrawn, the vendors thus being left free to give the purchasers clear title. The position which Grace took up was almost exactly the same as that assumed by the mortgagor in *Rose* v. *Watson*,[8] and certain observations in the judgment of Lord Westbury, L.C., are worth quoting in full, because they are so apposite to the situation in *Grace* v. *Kuebler*. These observations run: "The mortgage to the appellants being made subsequently to the contract of sale, and, of course, subject to that contract, conveyed to the appellants only that which the vendor was entitled to under that contract. And they were content

[7] *Ibid.*

[8] See previous chapter.

at that time to let their case remain upon that footing; for, by the notice which they gave to the purchaser, they did not at all attempt to interfere with the contract. They left the purchaser still bound and liable to perform that contract; and in conformity with its terms the purchaser was bound to pay those sums of money as interest, to the vendor, who was the assignor of the present appellants. The appellants might, if they had chosen so to do, have given notice to the purchaser to pay those sums of money to themselves; but having merely a mortgage, and not choosing to interfere with the possession by the vendor of the mortgaged property, the appellants left the mortgagor . . . in possession of his rights under that contract, and they left the present respondent bound of necessity to continue to make the payments of necessity because there was no notice on the part of the appellants that they desired to interfere with that contract, or to give to the moneys payable under that contract a different destination from that which the contract assigned to them."

In allowing his transactions with the vendors to take the form it did Grace, like the purchasers, relied on the vendors' honesty and, like them, he had suffered through his confidence being misplaced. Consequently, and as was properly said by Beck, J., the court had to decide between the claims of two innocent parties suffering through the fraud of a third.

But there was this fundamental difference between their respective positions. The purchasers' interest was unregistered; that of Grace had been registered by means of his caveat and it therefore had priority. True it had been acquired and registered after actual notice of the existence of the interest of the purchasers. But actual notice of an earlier unregistered interest is not sufficient of itself to deprive a registered interest of priority, and mere notice, though actual, cannot of itself impute fraud.[9] There must be something more than notice. The later acquired interest must have been registered, or its registration proposed to be taken advantage of, with the intention of excluding the unregis-

[9] Man. 99; Sask. 194; Alta. 135.

tered interest to the profit of the holder of the registered interest. It has been said of the three following English cases in which a registered interest was postponed to one of earlier date but unregistered that (with a fourth case not relevant here) "their authority has always been upheld and they also contain every matter of principle applicable to the subject.[10] In *Lord Forbes* v. *Deniston,*[1] a deed was registered with actual notice of an unregistered lease of part of the property covered by the deed and the grantee under the deed attempted to take advantage of the fact that the lease had not been registered to eject the lessee and let the property again at a much higher rent. The lease was upheld against the grantee under the deed. In *Cheval* v. *Nichols*[2] and *Blades* v. *Blades,*[3] land was purchased in the first case with actual notice of an earlier unregistered charge, in the second with like notice of an earlier unregistered sale, the purchaser in each case buying the property and registering his deed with the apparent intention of gaining priority over the unregistered interest. He was postponed to it on each occasion. To have dealt otherwise with him would have been to allow him to commit a fraud on the holder of the unregistered interest. In describing the sort of fraud which alone can deprive a registered interest of priority the Yorkshire Act of 1884 uses the expression "actual fraud"; and of it Stirling, J., said in *Battison* v. *Hobson,*[4] "'actual fraud,' I understand to mean fraud in the ordinary popular acceptation of the term, i.e., fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eyes of a court of equity." In *Assets Co. Ltd.* v. *Mere Roihi*[5] it was said of the sections of the Land Transfer Acts of New Zealand, making a registered title voidable by fraud, that they "appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called

[10] Brickdale & Sheldon *Land Transfer Acts* (2nd ed.), p. 564.
[1] 4 Bro. Parl. Ca. 189.
[2] 1 Stra. 664; 2 Eq. Cas. Abr. 63, s. 7.
[3] 1 Eq. Cas. Abr. 358, s. 124.
[4] (1896), 2 Ch. D. at 412.
[5] (1905), A. C. at 210.

constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity very similar to those of fraud." A like view of the meaning of fraud under the Western Canadian Acts was taken in *Independent Lumber Co.* v. *Gardner.*[6] It follows that before the priority of Grace's caveat could be displaced, it had to be shown that he had been guilty of positive dishonesty importing grave moral blame in registering it or in afterwards claiming a priority by virtue of its registration.

It may be observed, to begin with, that mere suspicion of fraud is not enough to justify the over-riding of an act of parliament which gives a registered interest priority over one not registered; the evidence must be quite definite. So far from any positive evidence on that head being offered it was not even hinted that Grace's conduct had at any time been actuated by fraudulent intent. Then his knowledge of the existence of the purchasers' unregistered interest could not of itself impute fraud. It was said in *Sydie* v. *Saskatchewan & Battle River Land Co. Ltd.,* that "a very logical distinction is there (i.e., in Hogg's Australian Torrens System) suggested between mere knowledge of the existence of an unregistered interest which may not necessarily be hurt by the transaction attacked and knowledge that the effect of that transaction will be to injure or destroy that interest."[7] That is the very distinction which has to be made here. There was nothing in the transaction between Grace and the vendors which necessarily hurt the purchasers' interest, and it would not have been injured in the least had the vendors been honest men. But Grace could not be expected, still less regarded as obliged, to allow for a possibility of dishonesty on the part of the vendors which might result in the purchasers' interest being postponed to his because his was registered while theirs was not and to have refrained from registering his interest accordingly; more particularly when the purchasers' conduct raised a presumption that they did not believe in such a possibility. He was entitled to assume

[6] 3 S. L. R. 140.
[7] 6 A. L. R. at 393.

that the purchasers knew their own business, and he was not in any fiduciary relation to them for he had not bought the vendors' estate, which might have made him a trustee for the purchasers to the same extent as the vendors were, but had taken a mortgage of it which did not make him a trustee for them at all; and as he occupied no fiduciary position towards them he was free—it was not fraudulent for him—to register his mortgage in spite of his knowledge that they had not registered their purchase;[8] "and it is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties."[9] Moreover, it was not a fraudulent thing for him to refuse to repeat in his transaction the same gross negligence as the purchasers had displayed in theirs and heedlessly to reject the opportunity which the Act held out to him of protecting his interest by recording it on the vendors' certificate of title in the land titles office—the register. Again, had Grace proposed, either originally or afterwards, to exclude the purchasers' interest through the priority which the registration of his caveat had secured for his equitable mortgage, the action which he subsequently brought would have taken a different form. Instead of a suit for specific performance he would have immediately proceeded to realize his security giving the purchasers notice of whatever action he was taking. He did nothing of the kind. Faced with an unexpected and heavy loss he come to a court of equity virtually to ascertain whether, since such a court protects the vigilant and not those who neglect their opportunities, the fact that he had registered his interest rendered his heedfulness in that respect the equivalent of giving notice to the purchasers, though in a constructive sense only, of the assignment to him of the contract of sale. The proceeding was a grave mistake but there was no taint of *mala fides* about it.

The conclusion seems clear enough. A wholly unlooked for state of affairs had been created by the fraud of the vendors and one of the two innocent parties had to suffer. The purchasers had not acted as ordinarily prudent men in that

[8] *Battison* v. *Hobson* (1896), 2 Ch. D. 403.

[9] Cozens-Hardy, M.R., *Re Monolithic Bldg. Co., Ltd., Tacon* v. *The Co.* (1915), 1 Ch. at 669.

they had not sought legal assistance in their purchase, which of itself amounted to negligence. In addition they had been guilty of gross negligence in not registering a caveat to protect their interest when acquired. The position in which they found themselves was primarily due to these unreasonable omissions. Grace, on the other hand, had promptly registered his equitable charge by means of his caveat and so had a legal or statutory priority. There was no doubt thus far as to which of the two parties had the better equity, for the law, like heaven, helps those who help themselves: *Vigilantibus non domientibus jura subveniunt.* Then, instead of registration not entering into the matter at all, as was said in one of the judgments,[10] it was registration which was the deciding factor. The rule of the Acts is explicit and unequivocal. Registered interests have priority according to their respective dates of registration to the entire exclusion of unregistered interests save when a registered interest has been placed on the register with such disregard of one unregistered that its registration, if upheld, would constitute a fraud upon the unregistered interest. No facts had been adduced to establish such a fraud in Grace and an examination on the purchasers' behalf of what evidence there was to throw light on his intentions at the time when he registered his caveat and afterwards was against any inference of *mala fides.* Consequently, while Grace could not succeed in his suit for specific performance, neither could the purchasers be more successful in their counterclaim for a transfer and title clear of Grace's caveat. The land and the registered title to it had to be left in the vendors' names encumbered with the registered charges against it, two mortgages and Grace's caveat, and the purchasers could only get an order for a transfer conditioned on their paying off, or, the same thing, taking subject to these charges.

The underlying principles of the Acts are simple and few but they are essentially fundamental and not likely to be broken in upon. Priority by registration is one of them. The Yorkshire Registry Act is based upon the same principle,

[10] (1917), 3 W. W. R. at 984.

with others, and enacts that the rule of priority is only to be set aside by actual fraud notwithstanding actual or constructive notice of an unregistered interest to the person registering. Of this provision it has been observed that it is "the absolute rule, save only in cases of fraudulent or voluntary assurances. Thus a subsequent purchaser or mortgagee who registers first has priority over an earlier unregistered assurance notwithstanding that he took with notice of it."[1] Speaking of the same act, Stirling, J., said in *Battison* v. *Hobson*,[2] "It does seem to me that the legislature has twice over anxiously provided that the priorities given by the Act are not to be altered except in cases of actual fraud, and I am certainly not disposed to fritter away the language of the Act." The Western Canadian legislatures have displayed a like anxiety in enacting exactly the same rule, and in the absence of evidence of fraud in Grace it would undoubtedly seem to be frittering away the language of the Acts not to recognize the right to priority of his registered charge over the purchasers' unregistered interest.

A shorter route to the same decision could have been taken in *Weidman* v. *McClary Manufacturing Co.*[3] had the issue there been treated as one of priority. A purchaser under the usual agreement of sale had registered a caveat and paid some of the instalments of purchase-money before and some after a writ of execution against the vendor had been filed. He received a certificate of title endorsed with the writ and in the action brought to obtain an order for its removal the execution creditor counterclaimed for the amount of the payments made after the date on which the writ had been lodged in the land titles office. It was held that the writ did not bind the vendor's interest. But the question was really one of priority. Priority by registration is a fundamental principle of the Acts. Registration of his caveat had given the purchaser's transaction priority throughout the period of the contract up to its completion. Nothing short of actual notice could interfere with his right to pay the vendor the instalments of purchase-money in priority to

[1] Hals., vol. XXIV., p. 306, s. 555.
[2] (1896), 2 Ch. D. 403.
[3] 10 S. L. R. 142.

anyone else; and no such notice had been given him by the execution creditor. The bargain had been completed under cover of the priority offered by the caveat and the writ consequently must come off the title.

There is another point worth mentioning. On whatever ground the memorial of the writ might be removed its removal proved that it had no right to be on the register. The registrar, therefore, had made a mistake in entering it on the purchaser's certificate of title. The assurance fund is liable to make good all damages suffered through the mistakes of registrars. The purchaser was allowed the usual party and party costs, but he presumably had to pay those between attorney and client. These latter costs represented the amount to which he had been damnified by the registrar's error of judgment and he should have been able to make a successful claim upon the assurance fund for re-imbursement of them.

The persons or class of persons whom the Acts enable to use the caveat are empowered to do so in varying terms, from the comprehensive brevity of the Saskatchewan Act—"any person claiming to be interested in land,"[4]—through the distinguishing expressions of the Act of Manitoba—"any person claiming an estate or interest in land, mortgage or encumbrance"[5]—up to the elaborate phraseology of the Act of Alberta—"any person claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission, or under an unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person, or otherwise howsoever in any land, mortgage or encumbrance."[6] The words "or otherwise howsoever" would seem to serve as a solvent reducing the provision in which they are employed to mere equivalence with the shorter phrase of the Act of Saskatchewan; while the distinction between an "estate" and an "interest" made in the Act of Manitoba appears to be inapplicable to the kind

[4] Sask. 128.
[5] Man. 138.
[6] Alta. 84.

of ownership of land obtaining in Western Canada. In theory English law does not recognize absolute ownership of land in a subject—only in the Crown. In theory, again, which ordinarily corresponded with practice, the King is the supreme owner or lord paramount of every parcel of land in the realm; and all land is holden of some lord or other either immediately or mediately of the King. English law recognizes, once more theoretically, a subject's property in land but not any absolute ownership in him. The most absolute property which he can have in land is but an estate, and an estate in fee simple is the greatest interest in land which he is permitted to hold.[1] The greatest interest which an owner of land in Western Canada acquires is still nominally a fee simple under the original grant from the Crown. Actually, however, he receives the absolute ownership. The sole right remaining to the Crown is a right of expropriation for public purposes, which belongs to the same class of rights as its right to take the property of a subject in the form of taxes for the support of the government or the right to a subject's life in the defence of the realm. Not even in theory can it be said that land in Western Canada is held of some lord or other, either immediately or mediately of the King. Consequently there is not here the historical justification which exists in English law for the use of the word estate when speaking of an interest in land. Owing to its established position in English jurisprudence the word must necessarily remain part of the legal vocabulary of every jurisdiction the basis of whose law is the law of England. But, since an estate is also an interest in land, when the opposition of the two terms can serve no useful purpose, which it cannot do in the Manitoba Act, the employment of the single word "interest" represents a gain, not only from the point of view of simplicity but, as it happens, from that of accuracy as well. In legislation, therefore, an expression like "interested," as in the Saskatchewan Act, or better, "having an interest," is to be preferred to "estate or interest."

In order, then, to be able to register a caveat the caveator

[1] Williams *On Real Property* (21st ed), pp. 7 and 8.

must have a claim to an interest in the land against the title to which his caveat is intended to be registered. The general rule is that the interest must be one in respect of which a court of equity would decree specific performance.[8] The more important or commoner of equitable interests in land are the interest of a *cestui que trust* under a trust settlement, interests created by a *cestui que trust,* the interest of a purchaser under a contract of sale, equitable charges created for value or by testamentary disposition, the interest of a vendor of land through the innocent misrepresentation of the purchaser, and an interest in land created by a restrictive covenant in regard to its use given for valuable consideration.[9] The Acts being concerned with land it is natural to observe that they are silent on the question of whether the interest must be evidenced by a document in writing, so as to show that the caveator's claim is not barred by the Statute of Frauds. It has been held that a written instrument is not essential to the founding of a caveat and that the validity or otherwise of the claim which it protects is a matter for subsequent decision by the court.[10] If it is not necessary for a caveator to claim under a written instrument at all it follows that when he does so claim the form of the instrument is wholly immaterial. Consequently *M. Rumely Co. v. Registrar Saskatchewan Land Registration District,*[1] may have been wrongly decided, because it was there held that an equitable mortgagee could not base a caveat on an instrument called an encumbrance but which was not in the statutory form. The observation was also made that "it was imperative to use the mortgage form when an owner desires to charge his land with a debt or loan."[2] This would not seem to be correct either. The forms prescribed by the Acts are merely forms for instruments intended to be registered. They are not proposed as the only forms by which valid interests in land can be created. The Acts place no restriction on an owner's power to alienate or charge his land in

[8] *Howard* v. *Miller* (1915), A. C. 318.
[9] Ashburner *Principles of Equity,* pp. 99, 100, 101 and 103.
[10] *Re Wark Caveat,* 2 S. L. R. 431.
[1] 4 S. L. R. 466.
[2] *Ibid.,* at 471.

any way that he may choose. What they do is to compel the grantee to use the statutory forms if the instrument of grant or charge is itself to be registered. He is left free, however, to accept any sort of document conferring a grant or charge if he is content to register it by means of a caveat and is satisfied with such protection as a caveat affords. Consequently Brown, J., was on firm ground in *Imperial Elevator Co.* v. *Olive,* when he said "the mere fact that the Act prescribes a form of mortgage for registration, and that the unregistered instrument which creates the equitable mortgage is not in that form should not . . . constitute a bar to the protection of such mortgage interest";[3] protection, that is, through registration of a caveat founded on the instrument not in the statutory form. When a written document supplies the basis for a caveat the interest claimed must be derived from the document.[4]

An execution creditor with a registered certificate of judgment,[5] or writ of execution,[6] has a sufficient interest in the debtor's land to support a caveat. So has an equitable mortgagee under an agreement to give a mortgage;[7] and an acknowledgment of a debt with, in consideration of an extension of the time for paying it, a promise to give a mortgage on demand, coupled with a declaration that the instrument containing the acknowledgment and promise is to be deemed an encumbrance and the holder is to have the powers conferred on an encumbrance by the Land Titles Act, makes the holder an equitable mortgagee.[8] But such a mortgagee must prove his claim before he can enforce his charge.[9] A mortgagee who has a mortgage in the statutory form which is defective in some particular preventing its registration can register a caveat based on the mortgage.[10] A *cestui*

[3] 7 S. L. R. at 402.

[4] *Re G. T. P. Dev. Co.*, 5 S. L. R. 313.

[5] *North of Scot. Can. Mtge Co.* v. *Thompson*, 13 M. L. R. 95.

[6] Alta. 84.

[7] *Thompson* v. *Yockney*, 23 M. L. R. 571; 50 S. C. R. 1; *Imperial Elev. Co.* v. *Olive*, 7 S. L. R. 395.

[8] *Imperial Elevator Co.* v. *Olive*, 7 S. L. R. 395; *Coast Lumber Co.* v. *McLeod*, 7 S. L. R. 382.

[9] *Gilbert* v. *Ullerich*, 4 S. L. R. 56; *Gilbert* v. *Reeves*, 4 S. L. R. 97.

[10] *Reeves* v. *Stead*, 13 D. L. R. 422.

que trust under a verbal agreement has a sufficient interest so far, at least, as to justify a judge in continuing the caveat which the *cestui que trust* has registered, leaving to the court the decision whether the fact that the agreement creating the trust was not in writing brought the transaction within the Statute of Frauds.[1] After a railway company has filed a plan pursuant to the provisions of the Dominion Railway Act, and as a preliminary to proceedings for the expropriation of the right-of-way shown on the plan, the plan constitutes a valid basis for a caveat.[2] Doubt has been expressed as to whether a vendor who has given a transfer of the land before being paid the whole of the purchase-money can register a caveat to protect his vendor's lien;[3] but since, in such a case, equity gives a vendor an interest in the land sold to the extent of the purchase-money owing him,[4] it would certainly seem that this equitable interest is quite as good a foundation for a caveat as any other interest of the kind. A partner under a verbal partnership, the partnership assets including real property, has been held entitled to register a caveat based on the agreement.[5] A purchaser of land from a vendor who is not the registered owner of it, holding only a transfer from the registered owner, has a sufficient interest to register a caveat against the title for the land.[6] When an agreement of sale contains a stipulation that, on surrender of the agreement with payment of the final instalment of the purchase-money, the purchaser is to be entitled to a transfer clear of all encumbrances and subject only to the reservations in the grant from the Crown and to a reservation of minerals, and the vendor, having registered a caveat, makes the transfer subject to the caveat, he cannot maintain the registration of the caveat in perpetuity; but the registration should stand until the purchaser brings an action to determine the rights of the parties; the purchaser, on his side, not

[1] *Re Wark Caveat*, 2 S. L. R. 431.

[2] *Re Mooseeana Subd. & G. T. P. Branch Lines* (Sask.), 7 D. L. R. 674.

[3] *Dick* v. *Lambert*, 9 W. W. R. 905.

[4] Ashburner *Principles of Equity*, p. 340.

[5] *McCullough* v. *Graham*, 5 A. L. R. 45.

[6] *Brooksbank* v. *Burn*, 15 W. L. R. 661.

being able to demand the caveat's removal until he has proved that it has no right to be there.[7]

On the other hand, when the vendor under such an agreement as that last mentioned registers his caveat after delivery of the transfer to the purchaser, he has no interest left in the property on which a caveat can be founded since his interest terminated with the termination of the contract.[8] The vendor's proper course in such a case is to reserve the interest in the grant, or to grant the entire fee and obtain a re-grant of the interest desired to be reserved.[9] An execution creditor cannot register a caveat against the title to land purchased by the debtor under an agreement of sale providing for payment of the purchase-money in instalments when the debtor has made default in payment and so has no interest worth anything in the land.[10] A solicitor's lien for costs on a transfer in his hands for his debtor client does not confer on him an interest in the land transferred so as to enable him to register a caveat against the title.[1] An option to purchase land given by an instrument executed on a Sunday, being void, cannot found a caveat;[2] nor a mortgage of a homestead before the Crown grant has been issued when the mortgagor has not made the affidavit required by the Land Titles Act (of Saskatchewan) establishing his right to mortgage the land.[3]

Is a registrar to take upon himself the responsibility of deciding whether a caveat discloses a sufficient interest? The suggestion has been made that he should accept it in some degree. It was said in *In re Ebbing*,[4] that a registrar "would be misconceiving his duties who would decide on the sufficiency of such a document (a caveat) on grounds involving subtlety and nicety of decision. But for all that . . .

[7] *Re Vancise*, 10 S. L. R. 292.

[8] *Re G. T. P. Development Co., Ltd.*, 5 S. L. R. 313; *Re Jamieson's Caveat*, 6 S. L. R. 296.

[9] *Re G. T. P. Dev. Co., supra.*

[10] *Foss* v. *Sterling Loan*, 8 S. L. R. 289.

[1] *Waters* v. *Campbell* (Alta.), 14 D. L. R. 448.

[2] *Fallis* v. *Bathasar*, 2 W. W. R. 132.

[3] *In re Ebbing*, 2 S. L. R. 167; *Garr Scott Co.* v. *Guigere*, 2 S. L. R. 374.

[4] Prendergast, J., 2 S. L. R. 167.

the duties of a registrar in the matter are not merely ministerial in the narrow sense of the word, but also, within certain limits at least, judicial. He has a discretion to exercise. He should see to it that altogether idle instruments should not be placed on record." The principle seems plausible but considerable difficulty might be experienced in applying it. How far can a registrar safely carry his ideas as to idleness in an instrument? Or within what limits is he to allow his notion of subtlety to contract his conception of nicety in decision? Above all, he must always reflect that if his judgment in any of these particulars is mistaken his error may have to be paid for out of the assurance fund, a consideration which has no terrors for a judge. Then a caveator registers a caveat at his own risk; he has to make good any damage caused through his clogging of a title.[5] On the whole registrars would seem to be well advised in confining their responsibility in the matter to making certain that a caveator complies with the formalities observance of which is required of him by the Acts.

There has been an inclination to regard a caveat as a somewhat informal instrument not requiring the same respect for accuracy or fullness of statement as other registrable instruments. Thus it was said in *In re Ebbing*[6] that a caveat is not intended to have the completeness and legal precision of a statement of claim in an action; and in *McKillop & Benjafield* v. *Alexander,* that "a strict compliance with statutory form was not essential."[7] These views do not seem to be free from doubt. Whether a caveat is technically an encumbrance or not in practice it is as much one as a mortgage. Like a mortgage it stands for an interest in the land against the title to which it has been registered. The interest may or may not be a valid one, but a person proposing to acquire, subsequent to the caveat's registration, another interest is compelled for his own security to assume its validity, and he cannot safely have anything to do with the property until the caveat has been removed or

[5] Man. 143; Sask. 139; Alta. 94.
[6] 2 S. L. R. at 170.
[7] 46 S. C. R. at 580.

satisfactorily accounted and allowed for. A registered caveat, therefore, encumbers a property just as much as a registered mortgage or lease; and to register a caveat is to interfere in a very serious and practical way with an owner's power of disposing of his property. The Acts have been devised for the precisely opposite purpose—of facilitating in every possible way the exercise of just that very power. Transfers, mortgages, leases, in fact any instrument executed by the owner himself can readily be admitted to registration because it is he who has executed them, and the transfer or mortgage is accompanied by his duplicate certificate of title. A caveat on the other hand is ordinarily registered by someone whose interest is not evidenced by an instrument which will enable him to obtain an immediate transfer to himself of a legal or statutory title; is never accompanied by the owner's duplicate certificate of title; and frequently depends for its complete proof on documents none of which have been executed by the registered owner. Yet, if the opinions referred to are correct, it follows that such greatly inferior evidence of an interest in land can more readily be admitted to the register than evidence consisting solely in documents bearing the registered owner's signature and supported by his duplicate of the certificate of title for his property; and this though the admission of such inferior evidence militates against the attainment of one of the chief objects of the Acts by embarrassing the registered owner in the exercise of his rights. The view in question does not, however, hold the field undisputed, for it was said in *Re Cass and Canada Traders Ltd.*,[8] that since "registration of a caveat has the effect of preventing the registration of dealings with the land, perhaps for a considerable time, it is but reasonable that a caveator should be held to a strict compliance with the Act." It is surely no light thing to encumber a title; and an owner would certainly seem to have a right to the fullest and most accurate information regarding a caveator's interest in order to be in a position to give a complete explanation of the condition of the title—the extent of his own interest—to anyone with

[8] 20 M. L. R. 139. See also *Jones* v. *Simpson*, 8 M. L. R. 124.

whom he may deal after the caveat has been registered; information as full and precise as that given in a statement of claim though not necessarily set out with the same elaborateness of phrase. The obligation of a caveator to a strict observance of the requirements of the Acts cannot be limited to compliance with the forms, with which alone the case just cited was concerned. The Acts say he must describe his interest: and, since their intention is to make the register a complete record of title, the description should be sufficiently ample and detailed to enable anyone transacting in reliance on the register after a caveat's registration to ascertain with exactness the extent of the interest left in the registered owner on the assumption that the interest claimed in the caveat is a valid one.

CHAPTER IX.

Writs of Execution and Certificates of Judgment.

The English writ of *elegit* has never run in Western Canada. It is mentioned but once in Western Canadian legislation, and then only in order to its abolition in express words.[1] At the very beginning of Dominion and provincial civil government in the West the writ of *fieri facias* goods was adopted by change of phraseology to the levying of execution against lands and estates and interests in lands when these could be taken in execution. Recently, however, the legality of the use of the writ for these purposes has been discussed, and not only discussed but doubted.[2] As the law of England was made the law of the new jurisdictions in so far as applicable to their conditions the English writs of execution were available for employment in them if they suited the circumstances of the country. All these writs derived their validity either from statute or the common law, or the established practice of the courts originating in a long-assumed power to compel obedience to their judgments.[3] In view of the then recent creation of the Western Canadian courts a new writ intended to take the place of an existing English writ could be given full legal validity by one authority only, a legislature, or, in the last analysis the same thing, by officers, judicial or other, exercising powers delegated to them by a legislature. The first thing to be done, therefore, is to determine whether the writ of execution known as *fi. fa.* lands owes its existence to positive enactment.

Originally, in the matter of executions against a judgment debtor's real property, the law and practice of Manitoba

[1] 1890 (Man.), c. 3, s. 1.

[2] *Weideman* v. *McClary Mfg. Co.*, 10 S. L. R. 142; *Seay* v. *Somerville Hardware Co.*, 11 A. L. R. 201; *Traunweiser* v. *Johnson*, 11 A. L. R. 224.

[3] *E.g. elegit*, 2 West., c. 18; *fieri facias*, same statute or common law, see Bacon's Abr. (1876 Am. ed.), vol. III., s. 698; attachment, see Stephen's *Commentaries* (16th ed.), vol. IV., p. 277.

governed throughout the West. The provincial legislature, in establishing a supreme court, did not take upon itself to decide what of English law on the subject of executions was suitable to the circumstances of the province and what was not so. This it left to be settled by the chief justice, whom it empowered to regulate the practice of the court, contenting itself with an instruction that all proceedings were to be in the simplest form possible [4] and with enacting that a writ of execution against a debtor's lands could be issued after a judgment had been registered for a year and his personal property had been exhausted.[5] It would clearly not have been giving effect to the expressed desire of the legislature for simplicity of procedure to have continued the use of the writ of *elegit* with its preliminary assessment of the value of the property by the sheriff, assisted by a valuation committee of twelve jurors, and the subsequent placing of the creditor in possession as tenant by *elegit* without any right of sale and under the necessity of going to the court a second time for authority to sell. Nor was this procedure applicable to the circumstances of the province in those early days. It presupposed the existence of debtors in receipt of rents or life incomes from estates and houses and the pioneering settlers who were in that happy situation must have been a negligible quantity. The only profit to be made out of land then, as for the most part now, had to be won by the personal labour of the landowner. Consequently the most practical way of enforcing a judgment debt against land was to sell the land with as little expense as possible to anyone who cared to acquire it for the purpose of living on and cultivating it. So the handiest writ available, that of *fieri facias* against goods, was adapted to serve for levying executions against real property. The new, or rather, adapted writ was given or acquired the name of *fieri facias de terris,* either in terminological analogy to that of the *fi. fa.* goods which was then called *fieri facias de bonis,* or, possibly, following the words of the Statute 2 West. c. 18, *fieri facias de terris et catallis.* The writ was certainly the only one

[4] 1871 (Man.), c. 22, ss. 1, 25 and 30.
[5] 1871 (Man.), c. 5, s. 1.

employed for extending lands from 1875 down to its abolition in 1890, and, equally certainly, was in use prior to the former date. It seems impossible to doubt that it has been the only writ of execution ever used in the province of Manitoba to compel payment of a judgment debt by a sale of the debtor's real property.

The Act of 1871 enabling a writ of execution to be taken out against a debtor's realty after a judgment had been registered for a year was repealed by the Administration of Justice Act of 1875, and what are now, in a large measure, the usual rights of a judgment creditor in all three of the Western provinces were given him in the place of those which he had possessed under the repealed act. Writs of execution might issue out of the Court of King's Bench against both goods and lands and after a return of *nulla bona* to a writ against the debtor's goods, and if the debt were not less than a given sum, execution might then be levied against his real property and interests in such property and the property or interest sold by the sheriff and title thereto conveyed to the purchaser who thereupon acquired all the debtor's estate or interest, legal or equitable.[6] The writ employed to levy execution against lands was the *fieri facias de terris*. In the same year in which this Act was passed the Dominion parliament created the jurisdiction of the North-West Territories and, in the matter of civil procedure, enacted that until the Council of the Territories passed an ordinance regulating the manner of enforcing civil judgments the procedure which had been adopted in Manitoba was to be followed in the Territories.[7] The first ordinance to deal with the subject was not passed until three years later. Thus, for a short while at least, a judgment for payment of money was enforceable from end to end of Western Canada against the real property of a judgment debtor by one and the same procedure in agreeable contrast to the divergencies in practice and in law which have since developed.

The new legislation passed by the Council continued the existing rights of a judgment creditor and much the same

[6] 1875 (Man.), c. 5, ss. 53 and 54.

[7] 1875 (Dom.), c. 49, s. 72, s.-s. 2; 1877 (Dom.), c. 40, s. 8.

procedure for enforcing them against a judgment debtor's property. But it went further in expressly enacting that the writ of *fieri facias* with the words "lands and tenements," substituted for "goods, chattels and personal effects," in other words the *fi. fa.* lands, should be used to extend a debtor's real estate.[8] A later ordinance supplied certain omissions and so made the procedure to all intents and purposes identical with that of Manitoba.[9] These enactments were preserved, their ultimate form being rules of court, in the successive consolidations either of the Judicature Act alone or of all the ordinances,[10] and were, in consequence, the law of the Territories when the provinces of Saskatchewan and Alberta were carved out of them in 1906. The rules of court were numbers 338, 355, 364, and 365 with Form B, the form of the *fi. fa.* lands. These rules and this form being parts of the Judicature Act were direct legislation on subjects with which they dealt. The statutes creating the new provinces enacted that all laws, and all regulations made thereunder, existing in the Territories immediately before the statutes came into operation, should remain in force in each province as if the statutes had not been passed.[1]

The first Judicature Act of Saskatchewan continued the effect of this provision, in so far as it concerned civil procedure, by declaring all rules of the supreme court of the Territories to be in force in the province save when inconsistent with the act and until altered or annulled by rules framed under it.[2] The old rules are now represented by rules 466, 486 and 487 of the rules of the supreme court of Saskatchewan, published in 1911, which make no practical alteration in their effect or even phraseology. But the new rules do not include the old rule 355 which made Form B the form for all writs of execution, the words "goods, chat-

[8] Ord. 4, 1878, ss. 32, 23.

[9] Ord. 3, 1884, s. 33.

[10] Ord. 2, 1886, ss. 263, 273, 274; C. O., 1888, c. 58, ss. 273, 283, 284; Ord. 6, 1893, ss. 336, 345, 346; C. O., 1898, c. 21, ss. 338, 355, 364, 365, Form B; C. O., 1905, c. 21, Rules of Court 338, 355, 364, 365, Form B.

[1] 1905 (Dom.), c. 42, s. 16.

[2] 1907 (Sask.), c. 8, s. 55.

tels and personal effects" or "lands and tenements" to be inserted according as execution was to be levied against personal or real property. No form of writ at all is contained in the new rules. They do not repeal rule 355, either expressly or by any necessary implication, nor do they abolish, by either method, Form B. Both rule and form consequently remain effective to authorize the use and provide the form of *fi. fa lands.* It seems not open to doubt, therefore, that the employment of that writ in the province of Saskatchewan for levying execution against the real property of a judgment debtor has a firm legal foundation in legislation.

The case is precisely the same in Alberta. The Supreme Court Act of 1907 repealed nothing, at least in express words. The new court was to "supersede" the supreme court of the Territories.[3] Rules of court could be made and promulgated by the lieutenant-governor or by the judges with his sanction, but in the meantime the rules, practice and procedure of the supreme court of the Territories were to be those of the supreme court of the province.[4] These continued in force until 1914 when the present rules of court were published. The new rules were to "supersede" all rules till then in force which were inconsistent with them.[5] Rules 583, 584, 624, 625, and 627 retain the substance and for the most part the very words of rules 338, 364 and 365 of the supreme court of the Territories. But, as in Saskatchewan so here, rule 355 authorising the use of the *fi. fa.* lands and Form B are not republished. There is nothing in the new rules which repeals them either expressly or tacitly. Consequently they are still fully operative to furnish a legal sanction and form for the *fi. fa.* lands. It seems clear, therefore, that in Alberta, as in Saskatchewan and Manitoba, the existence of a statutory basis for the use of the *fi. fa.* lands for compelling payment of a judgment debt by way of execution against the debtor's lands or interests in lands cannot be doubted.

[3] 1907 (Alta.), c. 3, s. 39.
[4] *Ibid.*, ss. 4 and 24.
[5] Rule 712.

Another statutory basis for the legality of the use of the *fi. fa.* lands has been sought in the Land Titles Acts themselves. In *Foss* v. *Sterling Loan*[6] it was held that the word "bind" was equivalent to the following sentence: "Under such writ the sheriff shall have the legal right to seize the lands of the execution debtor"; and in *Lee* v. *Armstrong*[7] it was said that the word removed any doubt there may have been as to the existence of a right to sell lands under a writ of execution. In the former case the authority cited was Halsbury's Laws of England, vol. xiv. p. 42. The passage runs: "The writ is said to bind the property in the goods of the judgment debtor in the bailiwick. When it is said that the goods are 'bound' what is meant is that the sheriff acquires a legal right to seize such goods." That statement is correct now because the Statute of Frauds enacted that a writ should not bind goods until it was in the sheriff's hands. But it did not hold good before that statute was passed. The binding effect of a writ of execution was defined in *Giles* v. *Grover*[8] and *ex parte Williams*.[9] The effect is that a debtor cannot lawfully alienate the goods. To this statement may be added, by way of amplifying comment, a quotation from the judgment of Mr. Justice Patterson, running as follows: "But this binding . . . relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt."[10] At common law a writ bound the debtor's goods from the date of the *teste*,[1] but a sheriff had no right to levy an execution until the writ had been delivered to him. By reason of the abuses, mentioned in Gilbert on *Executions*,[2] to which creditors put this operation of the law the Statute of Frauds enacted that a writ should not bind goods until it was actually in the sheriff's hands. The

[6] 8 S. L. R. 289.
[7] (1917), 3 W. W. R. at 898.
[8] (1832), 11 *Ruling Cases* 549; 9 Bing. 128.
[9] (1872) *Ibid.*; L. R. 7 Ch.. 314.
[10] *Ibid.*
[1] *Ibid.*
[2] Stevens *Encyclopædia*, vol. V., p. 482.

words of the statute are, "shall bind the *property* of the goods";[3] that is, the ownership in the goods or power to alienate them.[4] Subsequent legislation on the subject has regard to, and regard only to, the debtor's proprietary rights. The Mercantile Law Amendment Act of 1856 provided that no writ of execution should bind goods before actual seizure as aginst a bona fide purchaser without notice of the writ.[5] This provision and section sixteen of the Statute of Frauds were repealed by the Sale of Goods Act of 1893, section twenty-six of which re-enacts that a writ against goods is to "bind the property in the goods" from the time when the writ is delivered to the sheriff to be executed and continues the exception of a sale to a bona fide purchaser without notice of a writ in the sheriff's hands. Similarly, when a judicial interpretation had to be given to the word in section sixty-two of the Common Law Procedure Act, which provided that "service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands," Lord Campbell, C.J., said: "We take the word bind to mean that the debtor or those claiming under him shall not have power to convey or do any act as against the right of a party in whose favour the debt is bound."[6] Again, lands are not bound by a writ of *elegit* until they have actually been delivered in execution and the writ and sheriff's return lodged in the Land Registry Office and registered, after which the judgment debt becomes a charge on the land and the debtor cannot deal with it save subject to the charge. Clearly, therefore, a sheriff does not derive his power to levy execution from the binding effect of the writ. He must get it from some other source. Is there any other source than the writ itself as a mandate of a court with authority to command the person to whom the writ is addressed to do whatever the particular form of writ employed directs? It could not be contended that a sheriff is unable to seize

[3] 29 Car. II., c. 3, s. 16.

[4] *Giles* v. *Grover*, *supra*.

[5] 19 & 20 Vict. c. 97, s. 1.

[6] *Holmes* v. *Tutton* (1855), 24 L. J. Q. B. at 351.

lands until he has received notice of the receipt of a copy of the writ in a land titles office.

Next, of the effect of a writ of execution under the Land Titles Acts of Saskatchewan and Alberta; writs of execution against lands having been abolished in Manitoba and the procedure in that province being somewhat different in consequence.

After a writ has been received in a land titles office it either "binds and forms a lien or charge,"[7] or simply "binds"[8] all the debtor's lands within the judicial or the registration district in the land titles office of which the writ has been lodged. As already seen, the result of goods being bound by a writ of *fieri facias* is that the debtor is prevented from alienating them except by a sale in market overt or to a bona fide purchaser without notice of the writ. If the adoption of the writ of *fieri facias* for levying execution against real property is to be considered as having made the English rules governing executions against personal property the law in Saskatchewan and Alberta on the subject of executions against land, and it seems difficult to resist this conclusion, then the binding effect of a writ under the Land Titles Acts of those two provinces results in an execution debtor being rendered incapable of disposing of his real property save in a transaction with a bona fide purchaser or the like without notice of the receipt of the writ in the land titles office in which it has been filed. This construction harmonizes with and gives effect to the main object of the Acts, which is to confer indefeasible title on everyone who transacts with a registered owner in reliance on the register and who has not received such notice of an unregistered instrument as to ignore it would amount to fraud; and until a writ has been entered on the execution debtor's certificate it is unregistered.[9] The construction receives confirmation from the fact that in Australia, where the writ of *fieri facias* is also used to levy execution against lands, it has

[7] Sask. 149 (2).

[8] Alta. 77.

[9] As to the result of the Saskatchewan Act having made a certificate of title subject by implication to a filed writ, see THE REGISTER, REGISTRATION AND PRIORITY, *supra*.

been thought desirable expressly to enact that a writ does not bind land at all and then to make it bind as a charge, after seizure, from the date of its entry on the debtor's certificate of title, when it becomes valid against a bona fide purchaser without notice of it.[10]

The expression "lien or charge" in the Act of Saskatchewan has the disadvantage of redundancy. The lien cannot be one in the nature of a common law lien since that is based on possession; nor can either lien or charge have any equitable character, as being dependent on equity for recognition, since both are the creatures of express enactment. The element of possession being absent a lien can amount to no more than a charge so that the two words are synonymous. The charge (or lien) having been created by statute the statute is the sole source of information concerning its character and incidents. The charge is evidenced by the writ of execution and, under the Act of Saskatchewan, a writ of execution is an encumbrance,[1] as it is under the Alberta Act.[2] Until real property belonging to the debtor has been discovered and a writ can be registered it is of little use to an execution creditor since the execution debtor is still free to make bargains, valid against the creditor, with persons dealing in good faith and without notice of the writ.[3] But when a writ has been registered its legal character undergoes a great change. It becomes a registered encumbrance with priority from the date of its registration and a title indefeasible by any transaction of the debtor's not registered at the date of registration of the writ—fraud excepted. As a security, therefore, it has taken on a higher character. The creditor is no longer an execution creditor dependent upon a writ and its binding force but has become an encumbrancee with a registered encumbrance. A superior form of security always absorbs an inferior just as a greater estate does a lesser. The execution creditor's former and inferior rights are merged in his later and higher ones. With his former rights is lost his former remedy of seizure and sale by the sheriff save in so far as this has been preserved by the Acts.

[10] Hogg, pp. 134 and 541.
[1] Sask. 2, s.-s. 7.
[2] Alta. 2 (*g*).
[3] *Supra.*

In order to realize his security the execution creditor, as an encumbrancee, can avail himself of the procedure set up by the Acts for the sale of lands secured by mortgages and encumbrances. Both Acts contemplate sales by sheriffs, however, but neither confers on those officers any powers in that respect, assuming that they have already received them from other sources. An execution creditor is thus free to elect to proceed under the Acts or leave the sale to the sheriff.

The result of a certificate of title having been made subject by implication to a writ of execution has already been considered.[4] The implication has no effect at all in Alberta since it is of a registered writ, but in Saskatchewan it makes the execution register part of the Register proper.

It has also been seen [5] that the provision that a certificate of title is not to be issued nor a transfer or other instrument executed by the debtor to be "effectual," save "subject to the rights of the execution creditor under the writ,"[6] is equally wanting in practical consequences to the transactions of persons dealing with the execution debtor in reliance on the register. If the writ has been registered the provision is superfluous. If not registered, and since anyone dealing with the execution debtor in reliance on the register must have received actual notice of an unregistered writ of execution before he can be affected by it, and then only if his conduct imputes fraud when he ignores the notice received, whatever rights an execution creditor may have are unenforceable against such a person unless his transaction has been vitiated by fraud.

A writ of execution is made binding on "all the lands"[7] or the "land" simply of the debtor.[8] Both the Saskatchewan and Alberta Acts define "land" in identical terms; it is to include not only land in its ordinary and popular sense, but also every kind of estate or interest in land, legal or

[4] THE REGISTER, REGISTRATION AND PRIORITY, *supra*.
[5] *Ibid.*
[6] Sask. 149 (3); Alta. 77.
[7] Sask. 149 (2).
[8] Alta. 877.

equitable.[9] As a consequence, a writ of execution might seem at first sight to bind, under the Alberta Act, as formerly under the act in force in Saskatchewan up to 1917,[10] every legal and equitable estate or interest in land which the debtor proved entitled to. It was decided, however, in *Canadian Pacific Rly. Co.* v. *Silzer*,[1] that a writ only binds lands of which the debtor is the registered owner; and the present Act of Saskatchewan has been amended to read accordingly.[2] A writ does not, therefore, bind the equitable interest in land of which the execution debtor is a purchaser without registered title. But if the execution debtor proves to have an equitable interest of any kind and also to be registered as owner of it, then the significance of the word "land" is at once expanded to include an equitable estate or interest. Consequently, in the case just cited, had the purchaser registered a caveat, the register would have shown that he was the claimant to an equitable interest in the land against the title to which the caveat had been registered, and, if the claim were valid, the legal owner of the interest as from the date of the caveat's registration. In short, he would have been the registered owner of his equitable interest. So too, a *cestui que trust* who protects his equitable estate by the same means is the registered owner of that estate. For it is the intention of the Acts to confer the same kind and degree of security upon all persons who acquire either proprietary rights or mere interests in land and enter them in the register.[3]

Besides the cases of a purchaser and a *cestui que trust* there is that of a vendor who has sold a property but has not transferred the title to it and still has to receive some of the purchase-money. Applying the conclusion just reached—that a writ of execution once in a registrar's hands binds land and every kind of interest, legal or equitable, in land of which the debtor is the registered owner—to the conflicting decisions in Saskatchewan and Alberta, it would follow that

[9] Sask. 2 s.-s. 1; Alta. 2 (*a*).
[10] R. S. S. 1909, c. 41, s. 118 (2).
[1] 3 S. L. R. 162.
[2] Sask. 149 (2).
[3] *Gibbs* v. *Messer* (1891), A. C. at 254.

Seay v. *Somerville Hardware Co.*[4] was rightly decided in so far as it was there held that a writ of execution did not bind the equitable interest of an unpaid vendor who had transferred the title to the land and was no longer the registered owner; that *Adanac Oil Co.* v. *Stocks*[5] properly held a writ to bind the equitable interest of an unpaid vendor who was still registered as owner; and that *Merchants Bank* v. *Price*[6] and *Traunweiser* v. *Johnson*[7] were mistaken in holding that it did not.

The effect of a certificate of judgment in Manitoba has already received some attention.[8] By virtue of the provisions of the Real Property Act and the Judgments Act a registered certificate of judgment becomes a charge on the judgment debtor's property. Until registered, however, it can work no interference with the transaction of anyone dealing with the debtor as registered owner of his land in reliance on the register unless there has been such actual notice of the judgment to the person so dealing as would render his ignoring of it equivalent to fraud. But, as a registered charge, the judgment debt acquires the character of an encumbrance.[9] Consequently, like a writ of execution in Saskatchewan and Alberta, its legal status undergoes a complete change. The judgment creditor is no longer dependent on his certificate of judgment and under the necessity of applying to a court for leave to sell the property charged. He is an encumbrancee[10] with an indefeasible title to an encumbrance ranking for priority over all later registered interests and all interests not registered and in a position to avail himself of the simpler and more expeditious procedure provided by the Real Property Act. His inferior security having merged in the higher his former and inferior remedy is superseded by his new and superior one, for the Real Property Act does not contemplate land being sold by

[4] 11 A. L. R. 201.
[5] 11 A. L. R. 214.
[6] 7 A. L. R. 344.
[7] 11 A. L. R. 224.
[8] See THE REGISTER, REGISTRATION AND PRIORITY.
[9] Man. 2 (*g*).
[10] Man. 2 (*i*).

any other legal process than that which the Act itself sets up. Once his certificate of judgment has been registered a judgment creditor is, apparently, obliged to realize his security in the manner prescribed by the Act.

A recorded certificate of judgment binds the debtor's lands."[1] The Judgments Act[2] defines lands as including "all real property and every estate, right, title and interest in land or real property, both legal and equitable and of whatsoever nature and kind and any contingent, executory or future interest therein, and a possibility coupled with an interest in such land or real property, whether the object of the gift or limitation of such interest or possibility be ascertained or not, and also a right of entry, whether immediate or future and whether vested or contingent, into and upon any land." Thus it is apparently not necessary when land is held by common law title that the judgment debtor should be registered owner of the land for the judgment to bind his interest; and the interest may be bound as against a bona fide purchaser or mortgagee since the meaning of bind here is different from that which it has in the Acts of Saskatchewan and Alberta; the Judgments Act having made the binding effect of a recorded certificate of judgment equivalent to that of a charge created under hand and seal having priority from the date of its registration. In the Real Property Act "land" means, amongst other things, all estates or interests in lands whether legal or equitable.[3] Like every other instrument a certificate of judgment cannot affect any sort of interest in land of the judgment debtor so as to be valid against a bona fide purchaser or the like transacting on the register, until the certificate has been registered, actual notice imputing fraud excepted. Registration under the Act implies a registered owner of the estate or interest to be charged. Consequently, as in Saskatchewan and Alberta, land or an estate or interest in land must be registered in the judgment debtor's name before it can be charged, as against any one transacting with him on the faith of the

[1] R. S. M. 1913, c. 107, s. 3; and see Rule of Court 739.
[2] *Ibid.*, s. 2 (*f*).
[3] Section 2 (*a*).

register, with the judgment debt; and the judgment debtor is not only a registered owner when a certificate of title stands in his name but also when he has registered a mortgage or a caveat.

The similarities and differences between the law and practice in the three provinces lie in the following points: In Manitoba a certificate of judgment is registered; in Saskatchewan and Alberta a writ of execution. In Manitoba the binding effect of a certificate of judgment is defined by the Judgments Act and a recorded certificate binds as if it were a charge in writing created under the hand and seal of the debtor. In Saskatchewan and Alberta the constructions put on the word bind by the English courts determine the consequences of land being bound by a writ of execution. Thus, in the latter two provinces, a writ operates to restrict the debtor's power of alienation, but not so as to invalidate a sale or a charge to anyone without notice of the writ; a person dealing in bona fide on the faith of the register falling within this category. The like result is reached in Manitoba through the fact that to "record" a certificate of judgment is the same thing as to register it. Though the Alberta Act only makes a writ of execution a charge upon the debtor's lands while that of Saskatchewan makes it a lien as well, as the Judgments Act of Manitoba does a certificate of judgment, yet the effect of these different provisions is one and the same; and each instrument is simply a charge in all three provinces which registration of the certificate or writ converts into an encumbrance with the incidents attached to such a charge by their respective Land Titles and Real Property Acts. The implication in a certificate of title under the Acts of Manitoba and Alberta is of a registered judgment, so that a certificate of judgment in the one and a writ of execution in the other is never valid against a bona fide purchaser or mortgagee transacting in reliance on the register, fraud apart, until either instrument has been registered. In Saskatchewan, where the implication is of a writ filed, such a writ binds as against a purchaser without notice.

It is impossible to leave the subject of judgments and writs of execution without remarking on the conspicuously favoured position apparently intended to be given to a judgment creditor by Western Canadian legislation; a position

without parallel elsewhere. A judgment creditor is allowed either to file his writ in the land titles office of the registration district within which lies the bailiwick of the sheriff to whom the writ has been delivered to levy execution under, as in Saskatchewan and Alberta,[4] or, as in Manitoba, in every land titles office within the provincial jurisdiction.[5] The writ binds any and all real property of which the debtor may be registered owner at the time of the writ's filing or which he may acquire during the writ's currency.[6] A writ can be kept in force for an indefinite period by renewal at the end of every two years from the date of filing.[7]

The case is quite otherwise in the Australasian jurisdictions. There a writ of execution is explicitly declared not to bind real property. This done a writ is then made binding on land as a charge after the land has been seized by the sheriff or, in Queensland only, after the writ has been registered against the debtor's title. A writ is thus of no use to a judgment creditor until he is able to point to a particular property as owned by the debtor. If not executed within three months of its registration a writ lapses so far as it has any effect under the Torrens Acts. None of the Acts make a certificate of title subject by implication to a writ.[8]

In British Columbia a certificate of title is subject without express mention to writs of execution against the registered owner; but when a transfer or other instrument which he has executed is presented for registration the registrar concerned sends the execution creditor a notice of the transfer or other instrument; giving him a fixed time within which to file a *lis pendens,* failing which the new certificate of title is issued, or the new registration is made clear of the writ.[9] The burden of proof is thus placed where it should be, on the execution creditor instead of the registered owner. The latter is not called on, as in the three Western Canadian

[4] Sask. 149; 1917 (Alta.), c. 30, s. 40 s.-s. 5 (*b*).

[5] R. S. M. 1913, c. 107, s. 3.

[6] R. S. M. 1913, c. 107, s. 3; Sask. 149 (2); Alta. *Lee* v. *Armstrong* (1917). 3 W. W. R. at 898.

[7] R. S. M. 1913, c. 107; Sask. 149 (5); Alta. 77.

[8] Hogg, pp. 134, 135, 207, 285, 358, 448, 541, 631.

[9] R. S. B. C. 1911, c. 127; 1914 (B. C.), c. 43, s. 70 (*b*).

jurisdictions, to prove that he is not the debtor, but the creditor who has filed the writ is compelled to show that it has been filed or registered against the person or the land actually liable for the debt.

There is no implication of a writ of execution in an Ontario certificate of ownership; and a writ is without effect against a purchaser, even with notice of it, until entered in the register.[10] Under the English Land Transfer Act a writ of execution (the writ of *elegit*) does not bind the property extended until actually delivered in execution; and it is not the practice to register a writ until after execution levied.[1] But registration of a writ in the Land Registry is not registration against the title to land under the Act. In order to get a writ on to the register of titles a caution must be entered.[2] In fact no searches are made for charges under the Land Charges Acts when a property is held by absolute title[3] because "the precise language of the Acts as to the title acquired by a duly registered purchaser and the lengthy enumeration of liabilities to which the land is subject without these necessarily appearing on the register, seem to furnish a strong argument in favour of the Acts being interpreted as special statutes which are not affected by general legislation—prior or subsequent—imposing charges or burdens on land; such general charges do not seem, as a rule, to override and be paramount to the estate of the registered proprietor for the time being."[4] And the Irish Registration of Title Act compels a judgment creditor to specify the property to be charged before he can register his judgment mortgage.

While the legislation in the jurisdictions mentioned differs in detail it is consistent in requiring an execution creditor to discover whether the judgment debtor actually owns any real property and to ascertain what the property is

[10] R. S. O. 1914, c. 126, s. 62 (1).

[1] Judgments Act, 1864; Prideau *On Conveyancing* (20th ed.), vol. I., p. 83; Mather *Sheriff and Execution Law* (2nd ed.), p. 128.

[2] Land Transfer Act, 1875, s. 53.

[3] Prideaux *On Conveyancing* (20th ed.), vol. I., 1095; Brickdale & Sheldon's *Land Transfer Acts*, s. 89.

[4] Hogg, *Ownership and Encumbrance of Registered Land*, p. 169.

before allowing him to encumber a title with his writ. This requirement accords strictly with the purpose of the Acts governing the registration of title in those jurisdictions. It is also in accordance with the expressed and judicially determined objects of the Western Canadian Acts, which include the facilitating of transactions in land and security for purchasers and the like transacting with registered owners in reliance on their titles as shown in the registers. An execution creditor does not fall within the category of persons transacting on the register. Ignorant often whether the individual with whom he is dealing owns any real property, and usually not concerning himself to ascertain whether he does or not, he deals in reliance on his own estimate of his customer's credit or honesty. He accepts a risk. Not so a purchaser or mortgagee transacting on the faith of a register. He deals with a definitely ascertained property on the strength of a particular guaranteed title, and the Acts governing his transaction, in so far as it is concerned with the title, aim at eliminating the element of risk altogether. Given an ordinarily careful purchaser or mortgagee the transaction proceeds from start to finish on a basis of assured certainty. It is the purpose of the Acts to create that certainty for persons concerned in transactions in land. They are not proposed for the relief of creditors. If any advantage can incidentally be conferred on such without militating against the attainment of the objects of the Acts there is every reason for its being given. But the protection which, at first sight, would seem to have been afforded to judgment creditors does militate against the achievement of the purposes of the Acts. It embarasses instead of facilitating transactions in land. It compels anyone dealing with a registered owner to extend his investigation of title beyond the register. By imposing this obligation it violates a fundamental principle of the Acts that a person transacting in reliance on the register can wholly ignore all unregistered instruments of which he has not received actual notice the disregard of which would amount to fraud.

In point of fact much of the legislation on the subject of judgments and executions represents legal ideas of nigh a

hundred years ago. Both the language and terms of parts of the Judgments Act of Manitoba are taken from the English Judgments Act of 1838. That statute made a judgment which had been entered up binding on a judgment debtor's property of every kind, present and future, as if he had agreed in writing to charge it under his hand and seal. Clearly a rule of that sort did not tend to facilitate the transfer of land. As part of the unceasing movement towards simplicity of procedure the Judgments Act of 1864 prevented a debtor's property from becoming bound until it had been delivered in execution. The Land Charges Act of 1900 extended this provision by enacting that land should not be bound until a writ had been registered; and the practice of the Registry Office is only to register a writ after the sheriff has made his return to it. In short, the old notion that it was a proper and reasonable thing to allow a judgment creditor to charge all the property, present and future, of the debtor without specifying the property charged has been wholly abandoned and now he not only has to ascertain it but also to have it extended by the sheriff, and must register the writ with the sheriff's return before the judgment debt becomes a charge on the property. And if the charge is to be rendered valid as against a purchaser of registered land a caution based on the writ must be entered in the register.

Happily, however, the provisions which seem at first sight to divert the Acts from their proper end of meeting the convenience of owners of land and of persons concerned with transactions in land and to make them, in part at least, a means for the relief of judgment and execution creditors do not achieve that purpose except in Saskatchewan. The governing aim of limiting the investigation of title and estate to a single register still remains unfrustrated in Manitoba and Alberta. But a judgment or execution creditor is enabled to obtain a proper and substantial aid in the recovery of his debt from a debtor possessed of real property. In the place of a mere judgment security he can get a charge or encumbrance with indefeasible title and priority from the date of registration of his certificate of judgment or writ of execution. But he must first register the one or the other,

and that he cannot do until he is able to point a property of which the debtor is registered owner. In two out of the three provinces, therefore, a purchaser or mortgagee transacting with a registered owner on the faith of the register is still left with the protection and security which it is the main object of the Acts to create; can still confine his examination of title to the vendor's or mortgagor's certificate of title; and need not search for judgments or writs outside of the certificate of title but can await the giving to him of actual notice of the existence of such charges. A judgment or execution creditor, on the other hand, cannot obtain priority for his judgment debt as against such a purchaser or mortgagee unless his certificate of judgment or writ of execution stands registered on the execution debtor's certificate of title at the time when the purchaser's transfer or the mortgagee's mortgage is presented for registration.

CHAPTER X.

The Transfer.

A transfer was described in *Wilkie* v. *Jellett*[1] as "little, if anything, more than an agreement binding on a vendor, for a transfer not under seal would not, apart from the Act, pass any estate, and being a creature of the Act, it can only become effectual to pass the estate when it has been registered. . . . There is no difference, in reality, between the position of a purchaser who has paid the purchase price, but has not received his transfer, and a purchaser in possession of his transfer, except that the latter is in a position to complete his title at once, while the former has still to obtain his transfer and possibly to bring an action for specific performance in order to do so." Later comments have been in much the same sense. It has been said, for example, that "the practical effect of a transfer is nothing more, or, at all events, little more than a mere order to the registrar by the holder of the registered title to transfer the title to somebody else"; and again, that "it does little more than would be done by a letter from the transferor to the transferee running, 'I intend to transfer my legal estate in this land to you.'"[2] It has even been described as the equivalent of a mere quit claim deed, because what the transferor declares to transfer is "all his estate and interest in the said piece of land," and "there is nothing specifying what that estate and interest consists of";[3] although the very first thing a transferor has to do in a transfer is to describe the nature of the estate or interest he has in the land which he is about to transfer.[4]

A transfer, if ever nothing more than an order to a registrar to transfer a title, is such only when the transferor

[1] 2 Terr. L. R. at 149.

[2] *Arnot and Smith* v. *Peterson*, 4 A. L. R. 324; *Franz* v. *Hansen*, 12 A. L. R. at 413.

[3] *Bennett* v. *Gilmour*, 16 M. L. R. at 311.

[4] See the statutory forms in the schedules to the Acts, and s. 86 of the Act of Manitoba, and s. 48 of that of Alberta.

himself registers the transfer and receives the new certificate of title for delivery to the purchaser under a condition of sale similar to that which ordinarily governs the conveyance of land held by common law title, namely, a deposit having been made, the balance of the purchase-money is paid against delivery of an executed conveyance and the title deeds. Such a condition, however, never or rarely obtains, the almost invariable practice being for a purchaser to pay the balance of the price against delivery of a transfer only. This custom makes the transfer something quite different from an order to the registrar. A purchaser who has fully performed his contract of sale is in a position to call for a conveyance of the legal estate from the vendor and this right is an equitable estate or interest in the land.[5] A purchaser with a transfer is in a position to demand a certificate of title from a registrar and this must also be an equitable estate or interest; and a better one than the first because a registrar has no alternative but to comply with the demand while a vendor can conceivably force the purchaser into a suit for specific performance. An equitable estate can be created without the use of any particular ceremony or form of words provided the estate is expressed in writing and the writing is signed by the person whom it is to charge so as to satisfy the requirements of the Statute of Frauds.[6] Consequently a transfer from a registered owner is an instrument creating an equitable estate or interest in favour of the transferee. When this transferee, instead of registering the transfer gives another to a second transferee, as frequently happens, either as equitable owner,[7] or as entitled to become registered owner,[8] such a transfer is an instrument passing an equitable estate or interest, for, "although in the transfer of equitable estates, is is usual in practice to adopt conveyances applicable to the legal estate . . . this is never necessary. If writing is used and duly signed, in order to satisfy

[5] *London & S. W. Rly.* v. *Gomm* (1882), 20 Ch. D. 562.

[6] Williams, *V. & P.* (2nd ed.), p. 190.

[7] Sask. 74 and 2, s.-s. 2; Alta. 48 and 2 (*b*).

[8] Man. Practice. The general description "entitled, etc.," is not regarded as essential, however, and is not always used. For an explanation see *infra*.

the Statute of Frauds, and the intention to transfer is clear, any words will answer the purpose." [9] In short, a transfer is a conveyance of an equitable estate in such form as to enable the transferee to convert the equitable into the legal estate, or to get in the legal estate, by simply registering the transfer.

Although section eighty-six of the Real Property Act of Manitoba only empowers a registered owner to execute a transfer such an instrument, though executed by one who is not the registered owner of the land transferred at the time of execution of the transfer, can be registered. A support for the practice sometimes given is that a transfer "speaks" from the date of its registration. The analogy suggesting this explanation is obviously that of a will which "speaks" from the date of the testator's death. But what does "speak" in that connection mean? Simply that no disposition of the testator's property has been made by the will until the testator has died; he having been free in the interval between his death and signing of his will to alienate all his property and leave nothing for the will to dispose of, and that without any recourse in the beneficaries under it. A transferor who has signed and delivered a transfer has no such right. He is only free, while the transfer remains unregistered, to commit fraud by disposing of the property to anyone dealing bona fide and without notice of the transfer; and in such case the transferee can sue for recovery of the purchase-money and damages. The rule that no instrument can pass an estate or interest in land until registered is intended for the protection of persons transacting on the register. Otherwise all instruments, though unregistered, have their ordinary legal consequences. An unregistered transfer is a valid conveyance of an equitable estate and it "speaks" as to the conveyance of that estate from the date of its execution. Consequently it is certainly vocal in regard to one matter at least before it has been registered while a will preserves an absolute silence until the testator has died. Although section eighty-six authorises the execu-

[9] Williams, *V. & P.* (2nd ed.), p. 191.

tion of a transfer by a transferor who is also registered owner of the property about to be transferred and not by any one else, the maxim *expressio unius exclusio alterius* is one of very limited application.[10] There is no reason to suppose an intention to deprive equitable owners of capacity to give equitable assurances which can be registered by the transferees. To allow them to do so facilitates the transfer of land and so assists in the attainment of one of the objects of the Act. No objection exists in principle to transfers being given by persons who have not yet become registered owners.[1] The balance of convenience is in favour of their being permitted to do so. All of which constitutes sufficient justification for the practice without resorting to a somewhat defective analogy.

Since a transfer is an equitable assurance defeasible only by fraud in the registered owner the implications of the position are worth noting because they tend to clarify ideas regarding the possibilities of conveyancing under the Acts. It is no unfrequent occurrence in practice for an applicant for a certificate of title to lodge a series of transfers with an interval of several years between the first and the last and, the last being to himself, he secures without difficulty his registration as owner. In other words, perfectly valid conveyancing can go on outside of the register recognizing its existence only to the extent of using the statutory forms. It is possible, however, greatly to expand the existing practice. Circumstances can easily be imagined under which the title to land might be validly conveyed from individual to individual for a century without registration of a single document and the person entitled to the legal or registered estate at the end of that period applying for a certificate of title and obtaining one. A registered owner dies having devised the registered land by will to his son who is also sole executor. The son proves the will, signs the usual application for transmission, executes a transfer to himself as devisee and dies without having registered himself as owner. Under his will his son is sole executor and devisee and he, in turn, takes out pro-

[10] See chapter on *Wilkie* v. *Jellett, supra.*

[1] Thom, *Canadian Torrens System*, p. 231, citing Hogg, p. 912.

bate and executes a like application and like transfer to himself as devisee. He dies, too, having left a will in favour of his son similar in terms to those of his father and grandfather, and this son—the third generation of devisees—having proved the will and wishing to make his title quite secure, lodges the duplicate certificate of title, the probates, the earlier applications for transmission and transfers, with an application by himself and a transfer to himself as devisee. He would be entitled to be registered as owner and receive a certificate of title accordingly. Further, not once but several times in the course of the century each successive owner might have raised short loans from the local bank to finance his crop or purchases of stock, securing the loans by deposit of the duplicate certificate of title or of the certificate and a transfer in favour of the bank, with the intermediate documents of title, all of them having been returned to the then owner as each loan had been paid back.

The situation thus obtaining resembles closely that described in *Capital and Counties Bank* v. *Rhodes*,[2] which was concerned with the rights of a registered proprietor under the English Land Transfer Acts. A part of the judgment of Cozens-Hardy, L.J., reads: "Notwithstanding that the land has become registered land it may still be dealt with by deeds having the same operation and effect as they would have had if the land were unregistered, subject only to the risk of the title being defeated . . . by the exercise of the statutory powers of disposition given to the registered proprietor against which the mortgagee must protect himself by notice on the register. . . . The legal estate will pass on any conveyance on sale without registration. . . . There is no necessity for any change to be made in the register of proprietors. Conveyancing may proceed just as if the Acts of 1875 and 1897 had not been passed. Self-interest and the desire for security will doubtless induce persons, whether purchasers, or mortgagees, or lessees, to make use of the registers. But the legal operation and effect of common law assurances will remain untouched by want of registration." The legal estate cannot, of course, pass under the Western

[2] (1903), 1 Ch. 631.

Canadian Acts without registration. But that conceded and if equitable estate be read for legal estate and instruments creating equitable rights for conveyances and common law assurances the description fits the situation exactly. The Acts nowhere expressly impose on a transferee the obligation of registering his transfer nor on a mortgagee the obligation of registering his mortgage. The indirect compulsion exerted through the penalty which they exact for omission to register by providing that an estate or interest in land cannot be acquired save by registering the instrument conveying the estate or creating the interest is only intended to be imposed upon the holder of an unregistered instrument when he claims against anyone who had dealt with the registered owner in reliance on the register and who has registered his transfer or mortgage or other instrument. An equitable estate therefore can be transferred without registration of the instrument of transfer. There is no necessity, in order to the transfer, for any change to be made in the register. Such a transaction is only subject to the risk of the equitable title being defeated through exercise of the statutory powers of disposition given to the registered owner to avail himself of which would be a fraud on the owner of the equitable estate. Purchasers and others dealing with a registered owner will be moved to register their instruments by self-interest and a desire for security rather than because they cannot otherwise obtain title to any estate at all.

In point of fact a great deal of conveyancing outside of the register does actually go on. Transfers have already been alluded to. A purchaser of land under an agreement of sale payable in instalments acquires an equitable estate in the purchased property proportionate to the amount of purchase-money paid.[3] If he transfers his interest to a third party this transaction is ordinarily and quite properly described as an assignment of the contract. But from the point of view of the Acts it is a conveyance or transfer of an equitable estate outside of the register. Apart from other considerations the form of assignment used of itself proves the view of the Acts to be the right view. An

[3] See chapter on A VENDOR'S INTEREST IN THE PROPERTY SOLD, *supra*.

assignment is in form a deed under seal. The grantor, usually described either as "the party of the first part" or "the assignor," employs, with some superfluous verbiage, the essential words of grant — "doth grant." And he grants "all his estate, right, title, interest, claim and demand" in the land, "to have and to hold unto and to the use of" the grantee, who, in turn, is described either as "the party of the second part" or "the assignee." In witness of all of which the parties "set their hands and seals" to the assignment. Such a document is obviously a conveyance in common law form of an equitable estate in land. It is quite a usual thing for an agreement of sale to pass through several hands before being paid in full and a transfer given to the last assignee. Regarded from the standpoint of the law of contract the intermediate transactions are so many assignments of an agreement. Looked at from the point of view of the Acts they are equitable assurances of equitable estates in land and if, as so commonly happens, none of them is protected by a caveat, they take place off the register. In other words, they represent so much conveyancing outside of the register, conveyancing which is perfectly valid save against the fraud of the registered owner.

CHAPTER XI.

The Registered or Statutory Estate.

It has been claimed for the Torrens System that it "must be regarded as an entirely new system of conveyancing and real property law.[1] Proprietary and other rights in land under the system have been classified into rights which go with the "registered estate," equitable "rights," and those which may be styled "inherent rights."[2] When looked into, however, all these rights prove to be such as have been exercised and enforced for centuries and nothing appears to have been gained by giving them new appellations. But the claim of novelty is principally supported by pointing to the character of the estate of a registered proprietor under the system. He is described in an Australian certificate of title as "seised" of an "estate in fee simple" (or of "a leasehold estate"), and it is said that the change of nomenclature represented by the use of the word estate without the addition of either of the adjectives legal or equitable "marks a real change in legal outlook and theory and an appreciation of its importance is necessary in order to understand a leading principle of the Torrens system which may be thus formulated. The estate in land conferred by registration under the system is neither the common law legal estate or seisin, nor the statutory seisin given by the Statute of Uses . . . nor the equitable estate of English equity jurisprudence, but a new statutory estate which may be described as the registered estate."[3] Such a statement carries within it the seeds of comment. In the first place the common law legal estate—ownership, *dominium* or *proprietas*—is, not, as seems suggested, synonymous or identical with seisin. A discussion of what seisin has signified in the history of law is not lightly to be entered upon, but it may be remarked that

[1] Hogg, p. 710.

[2] *Ibid.*, pp. 776, 772 and 805.

[3] *Ibid.*, p. 766; see also Thom, *Canadian Torrens System*, pp. 122 *et seq.*

"seisin is possession; that is what Bracton says at the outset, that is what Coke says at the close of the mediaeval period"; and, "in season and (as the printed book stands) out of season also, he (Bracton) insists that *seisina* or *possessio* is quite one thing, *dominium* or *proprietas* quite another. He can say with Ulpian, *Nihil commune habet possessio cum proprietate.*"[4] The citation from the Roman jurisconsult may seem to be pressing the analogy somewhat strongly for possession in English law gives rights which make it look very like ownership. "Nevertheless we err if we begin to think of seisin as ownership, or any modification of ownership; after all it is but possession."[5] In short the full common law legal estate is something more than seisin because it includes seisin and, for the same reason, seisin is something less than the legal estate.

Again, the seisin or statutory possession of the Statute of Uses does not appear to have been in any wise different in the nature and extent of the practical rights which it conferred on the person who enjoyed it from the seisin or legal possession of the common law. What the statute did was to convert the possession of the beneficial owner (*cestui que use*), which at common law he enjoyed merely as tenant on sufferance of the legal owner and trustee (feoffee to uses), into full seisin or legal possession; that was, not to create a new kind of seisin comprising rights different to those belonging to the legal seisin, but to make the beneficial ownership of the beneficial owner equivalent to the sort of ownership which he would have acquired through a formal legal delivery of possession (feoffment) by the grantor (feoffor to uses) direct to himself. But here, again, the beneficial owner (*cestui que use*) got more than the seisin. The statute made him the legal owner to the extent of his equitable estate in the land.[6]

Then as to the registered estate being different from "the equitable estate of English equity jurisprudence" it is material to recall the fact that equitable estates vary a great

[4] Maitland's *Collected Papers*, vol. I., pp. 303 and 359.

[5] *Ibid.*, 370.

[6] Williams, *On Real Property* (2nd ed.), p. 174.

deal in the nature and number of the rights which they include. A *cestui que trust* under a settlement of land can exercise all the rights of ownership almost without restriction. On the other hand the ownership of a purchaser who has paid all the purchase-money but has not got either a conveyance or possession is mainly a legal fiction. Though deemed to be the owner he is incapable of exerting over his property a single right of ownership. The main difference between an equitable and a legal estate, apart from the manner of the creation of each, lies in the modes in which equitable and legal rights are enforced. But that is a matter of judicial procedure and not of conveyancing, and whatever changes the Acts have made in the latter they have not expressly altered the former nor do they appear to have done so by necessary implication.

This new registered estate is also contrasted with the registered estate of a registered proprietor under the English Land Transfer Acts and the case of *Capital & Counties Bank* v. *Rhodes* is said to have decided that the latter estate is not properly an estate at all but merely a statutory power to transfer the property by registered disposition.[7] Neither of these statements can be accepted as correct. When land within a county to which the Acts apply has been sold for the first time since the county was brought under the operation of the Acts the purchaser cannot acquire the legal estate until he has been registered as proprietor of the land.[8] Obviously, when so registered, he gets the legal estate; and of the two issues in the case in question the first was whether the leasehold estate already held by the purchaser when he bought the freehold or legal fee simple had become merged in the latter after the legal estate had passed to him on his becoming registered proprietor. That part of the decision is not relevant here, however. The other issue was whether a registered proprietor could convey the legal estate to a mortgagee by means of a charge in the statutory form in which had been inserted a conveyance of the property subject to a condition for redemption; and it was held that the legal

[7] Hogg, p. 767; (1903), 1 Ch. 631.

[8] Section 20, Act of 1897.

estate could be so conveyed. Obviously, again, it must have first been in the registered proprietor. The statutory power of a registered proprietor to transfer his property by a registered disposition is not declared to be the sole constituent of his estate. Elsewhere in the judgment of Cozens-Hardy, L.J., the same power is spoken of as an "overriding power," and it is said that the transfer by registered disposition of a registered proprietor takes effect by virtue of this overriding power and not by virtue of any estate in him. But, it was also held, having the legal estate, he could convey it by a common law conveyance, for, "notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have had if the land were unregistered. . . . The legal estate will pass . . . without registration. . . Conveyancing may proceed just as if the Acts of 1875 and 1897 had not been passed." And common law conveyancing takes effect by virtue of the legal estate resident in the grantor. The very essence of the decision was that a grantee of the legal fee simple, on applying to bring the land under the Acts, acquired on registration the like legal estate and he could transfer it by a transfer in the statutory form intended for registration and by virtue of his statutory overriding power, or could convey it by a common law conveyance by virtue of his legal estate, the conveyance not being intended to be registered but capable of being protected by means of a registered caution; or, again, as in this case, could convey the legal estate by a charge in the statutory form with a grant of the fee added as one of the stipulations which the Acts allowed and the registrar would accept.

It was also said in the same case that a registered proprietor need not have any estate at all in the land, a situation due, *inter alia,* to the terms of statutes which have no operation here. But the statement illustrates the fact that the actual registered estate or registered right of a proprietor under the English Acts appears to range from a mere overriding power up to the full legal fee simple. But, whatever the facts, he can convey to a bona fide purchaser his apparent registered estate as disclosed by the register. A registered

transfer of land confers on the transferee an estate in fee simple[9] and of this provision it has been said that "in the absence of any express reference in the Acts to the legal estate it seems probable that the estate here conferred is at least the equivalent of the legal estate except where . . . that is vested in an encumbrancer whose encumbrance is entered on the Register."[10] Speaking of the prevalent practice of transferring land by a statutory transfer accompanied by a common law conveyance the same authority says:[1] "every clause contained in the latter, as well as a conveyance of the legal estate, can be inserted in a transfer."

Compared with the supposed limitation of the estate of a registered proprietor under the English Land Transfer Acts to a simple power of transfer by registered disposition it has been claimed for a registered proprietor under the Australian system that he has "a real estate, which is not a mere power but is equivalent to the legal estate of ordinary conveyancing. This estate is, in fact, a 'composite' interest created by the system made up of what is equivalent to both legal and equitable estates under the general law, and one which cannot be separated or analysed into 'legal and equitable' as in ordinary English law."[2] This new "composite interest created by the system," however, is precisely the same thing as the estate of any one with a common law title to the fee simple and no outstanding interests. He has the full legal and beneficial ownership and his estate cannot be separated into legal and equitable. Then, the only circumstances in which the union of the legal and equitable estates in the registered proprietor is absolutely assured, once his certificate of title has been issued, is when he deals with a bona fide purchaser for value who is transacting with him in reliance on that certificate, the register. This is exactly the same situation as was intended to be created by the English Acts, for, "when we speak of 'absolute ownership' or 'fee simple' we do not mean that the act of registration is

[9] Section 30 of the Act of 1875.

[10] Brickdale & Sheldon, *Land Transfer Act* (2nd ed.), 178. See also pp. 12 and 18.

[1] *Ibid.*, p. 85.

[2] See Hogg, *supra*, note (*g*).

to transfer what is technically called the legal estate but that the registered owner shall, for all purposes of transfer to purchasers, represent and have power to deal with all legal and beneficial interests." But long before the day of Land Transfer and Torrens Acts equity regarded a vendor as having power to deal with all legal and beneficial interests when transacting with a bona fide purchaser without notice of such interests actually alienated but the existence of which had not been disclosed by the deeds which it was his duty to examine;[3] to deal, that is, with the very composite estate said to have been first created by the Torrens system. In short, the registered estate of a registered owner under the Acts of Western Canada, at all events, varies according to circumstances as the estate of the owner of land always has done. Usually the registered estate is the exact equivalent of the legal estate and beneficial estates. When the owner is dealing with a purchaser who transacts in reliance on the estate as disclosed by the register then, whatever the actual facts, the registered estate is deemed to be that which the register discloses, which is the same estate as equity deemed to be in a vendor dealing with a bona fide purchaser without notice of outstanding interests.

[3] *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.

CHAPTER XII.

A Vendor's Responsibility for Representations as to Quantities: More or Less.

Since a certificate of title is only prima facie evidence of an acreage, a frontage, or indeed, any measurement at all, a vendor is left with his ordinary responsibility at common law or in equity for any representations which he makes to a purchaser in regard to the dimensions of the property which he is offering to sell. In view of the not infrequent differerences between the surveyed and the actual dimensions of land the degree of variation either way covered by the words "more or less" and other like expressions is worth knowing if it can be ascertained. Their effect has been involved in several Canadian decisions and there is a comparatively recent one, *Wilson Lumber Co.* v. *Simpson*, decided in Ontario and affirmed on appeal,[1] in which their meaning was considered at length. A purchaser of land was suing for specific performance with an abatement of the purchase-money for a deficiency in quantity, the quantities having been qualified by "more or less." The judgment contains some sweeping criticism of English law on the subject and asserts that it is necessary to go to the law of the United States in order to find any consistent principles applicable to such an issue. As English law in this particular is the same thing as the law of Western Canada, both criticism and assertion invite attention. The judgment is also interesting because it deals with some other matters of practical importance in transactions in land.

The case is described in the judgment as raising the following issue: When a contract of sale describes a lot as having a certain depth, the measurement being qualified by "more or less," and a deficiency in the depth is proved, is the purchaser entitled to a decree of specific performance with a reduction of the purchase price sufficient to com-

[1] 22 O. L. R. 452; 23 O. L. R. 253.

pensate him for deficiency? And it is stated that no English or Canadian case had been found or referred to in which the question had been answered in the affirmative. In the English case of *King* v. *Wilson*[2] a lot had been sold as having a depth of forty-six feet, whereas the actual depth was thirty-three feet; and specific performance was ordered with compensation for the deficiency. The only relevant difference between that case and *Wilson Lumber Co.* v. *Simpson,* is that in the former the measurements were not qualified by "more or less." But the difference is negligible because by the overwhelming weight of English authority,[3] followed by some Canadian decisions,[4] that expression is limited to small inconsiderable errors. It would not have covered so great a deficiency as one-third as in *King* v. *Wilson,* nor a deficiency of over one-tenth as in *Wilson Lumber Co.* v. *Simpson.*

The general effect of the conclusions arrived at in the English cases in which the meaning of the expression "more or less" and similar expressions has been considered seems quite clear. The cases reviewed in *Wilson Lumber Co.* v. *Simpson* are *Hill* v. *Buckley,*[5] *Connor* v. *Potts,*[6] *Portman* v. *Mill,*[7] *Winch* v. *Winchester*[8] and *Townshend* (*Marquis of*) v. *Standgroom.*[9] *Hill* v. *Buckley* is the leading case for the principle of law that when a purchaser of land finds the quantity deficient he can claim an abatement of the purchase-money proportionate to the deficiency;[10] but it has no bearing on the meaning of the words "more or less," since the measurements of the property which was the subject of the action were not so qualified. *Connor* v. *Potts* applied the rule established in *Hill* v. *Buckley* but decided nothing as to the effect of "more or less" as those words were not inserted

[2] 6 Beav. 124.
[3] See *infra.*
[4] See *infra.*
[5] 17 Ves. 394.
[6] (1897), 1 I. R. 524.
[7] 2 Russ. 570.
[8] 1 V. & B. 375.
[9] 6 Ves. 328.
[10] *Per* Sir John Romilly, M.R., *Durham* (*Earl of*) v. *Legard* L. J. 34 Ch. (1865), at p. 590.

in the particulars. *Winch* v. *Winchester* would hardly be followed now.[1] *Portman* v. *Hill* contains a dictum by Lord Chancellor Eldon that a clause in conditions of sale to the effect that the parties are not to be answerable for an excess or deficiency in the quantities could not cover so large a deficiency as obtained in that case, namely, about one-third. In *Townshend* (*Marquis of*) v *Standgroom* there is another dictum of the same judge allowing that "more or less" might include "a few additional acres."[2] Granting that it may have been correct to say, as was said in *Wilson Lumber Co.* v. *Simpson* and in the American cases which it followed, that the meaning of "more or less" and cognate expressions was indefinite in 1812 when *Winch* v. *Winchester* was decided, and even as late as 1868 when the later American decision was given, the statement does not hold good to-day. In a series of cases concerned with sales upon conditions, and including one with a stipulation that the quantities were to be taken as correct and no compensation allowed for a deficiency, "more or less" and expressions such as "or thereabouts," have been regarded as covering only "unintentional" and "inconsiderable error,"[3] "accidental slips,"[4] or "small unintentional errors and inaccuracies."[5] Legal writers are to the same effect. Addison states that the words will only cover a "moderate excess or deficiency";[6] Leake that they only expose a purchaser to "the risk of a slight deviation from the quantity named";[7] Prideaux that they "will cover only slight errors."[8] There is another series of cases which have decided what quantities are not within the term. It does not extend to a deficiency of one-thirtieth in one lot or an excess of two-sevenths in another bought at the

[1] Prideaux, *Conveyancing* (22nd ed.), p. 46, note (*s*).

[2] 6 Ves. at p. 341.

[3] *Per* Lord Westbury, L.C., *Cordingly* v. *Cheeseborough*, 4 De G. F. & J. at p. 385.

[4] *Per* Sir G. J. Turner, L.J., *Dimmock* v. *Hallett* (1886), 2 Ch. App. at 29.

[5] *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

[6] *Contracts* (11th ed.), p. 502.

[7] *Contracts* (6th ed.), p. 228.

[8] *Conveyancing* (22nd ed.), p. 46.

same time.[9] It does not cover an excess of one-seventh;[10] nor a deficiency of one-third;[1] nor one of a fifth.[2] Most of these views, it has to be pointed ont, are on the effect of "more or less" when conditions of sale bind a purchaser to acceptance of the quantities as stated in the particulars and expressly exclude him from compensation for a deficiency. But the opinions of Addison and Leake have relation to open contracts as well. Obviously the same variations in quantity, if occuring under open contracts, would be excluded. If a purchaser who has agreed to accept quantities qualified by "more or less" as correct and to waive his right to compensation for a deficiency can only be regarded as having consented to forego that right in the event of an insignificant deficiency he cannot be held to have agreed to more than that when he has given no undertaking to accept statements of quantities as accurate nor made any waiver of his ordinary right to receive what he bargained for or an allowance for a shortage.

It may be true, as stated in Dart (V. & P. p. 675; cited in *Wilson Lumber Co.* v. *Simpson*), that the cases do not clearly define the precise effect of the expression "more or less." This inexactitude seems inevitable. There are certain words and terms which are incapable of precise definition, fraud being, perhaps, the most conspicuous example. "More or less" is another. The courts have gone as near as their opportunities allowed to a definition—that the words can only cover a small deficiency or excess; and in the particular cases which have come before them they have decided what a small deficiency or excess is not. The highest proportion has been one-third of the whole; the lowest one-thirtieth. All authoritative legal writers have reflected their views. The general result seems fairly definite. The rule is clear; and each case must be decided on its own merits. A deficiency of one-tenth, representing $1,500 on a purchase

[9] *Leslie* v. *Thompson*, 9 Ha. 267. This and the other proportions do not profess mathematical precision, but they are accurate enough for the present occasion.

[10] *Cross* v. *Eglin*, 2 B. & Ad. at 110.

[1] *Portman* v. *Mill*, 2 Russ. 570.

[2] *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *Jacobs* v. *Revell* (1900), 2 Ch. 858.

price of $12,000, and compelling the purchaser to modify his original building place—as in *Wilson Lumber Co.* v. *Simpson*—cannot, it would seem, come within the rule.

Detailed criticism of the two American cases followed in *Wilson Lumber Co.* v. *Simpson* is neither possible nor necessary but one or two salient facts about them may be remarked on. *Noble* v. *Goggins*[3] was a suit by a vendor (not a purchaser as in *Wilson, etc.,* v. *Simpson*) for specific performance which the purchaser was resisting unless he were allowed compensation for a deficiency of almost one-half in the quantity. The American court decreed specific performance without compensation. In a jurisdiction in which English law obtains the vendor in such circumstances could only have got specific performance on condition of making compensation for the deficiency.[4] *Mann & Toles* v. *Pearson,*[5] which was followed in *Noble* v. *Goggins,* and is there described as the leading case on the subject, though in form a common law action on a bond was, apparently, in effect a suit by a purchaser for specific performance in the shape of compensation (by way of refund) for a deficiency in quantity discovered after he had paid the purchase money and received a conveyance. Whatever American law on the point may be there is a clear tendency in English law to distinguish between the position of a purchaser after he has entered into an agreement of sale and while the agreement is still executory and his position after he has paid his money and taken his conveyance.[6] Consequently the decision in *Mann & Toles* v. *Pearson* could have no relevance to the issue in *Wilson Lumber Co.* v. *Simpson.* Lastly, stress is laid in *Mann & Toles* v. *Pearson* on the fact that New York State had been surveyed into lots etc., by the Government and the survey plans were available in various public offices for inspection; and these remarks are repeated in *Wilson Lumber Co.* v. *Simpson,* with the additional observation that

[3] 99 Mass. 231.

[4] *Rutherford* v. *Acton-Adams* (1915), A. C. 866.

[5] 2 Johns. 37.

[6] Some of the English cases are referred to in *Foster* v. *Stiffler*, 19 M. L. R. 533, and *Freeman* v. *Calverley*, 26 M. L. R. 331, and the inclination apparently is to accept the view of the English courts.

it would be a novel thing to hold that in such circumstances a purchaser was entitled to compensation for a deficiency. But apparently *Wardell* v. *Trenouth* (24 Grant's Chancery Reports, p. 465) had already so held. Further, neither the state of New York nor the province of Ontario are peculiar in the possession of government or official surveys. The same fact holds good of the United Kingdom. The Ordnance Survey was commenced in 1791 and formally authorised by a statute applicable to England and Scotland in 1841 (4 & 5 Vict. c. 30), a separate act for Ireland being passed later. The Ordnance survey maps are kept in the offices of the Board of Agriculture. Every parish has its parish map; and there are the tithe maps. But it has never yet been held in any case decided in England that the existence of such maps was a governing factor in or had anything to do with the application of rules of equity in suits for specific performance.

But, it would seem, the statement of the issue in *Wilson Lumber Co.* v. *Simpson* was too narrow. It was said to be concerned with a deficiency in the *depth* of a *lot*. A lot is land just as much as a farm or a section is land; and depth is a dimension or quantity just as much as acreage is a dimension or quantity. Add that the vendor, though conspicuously indifferent to accuracy in his representations of the quantities of his property, did not make a wilful misrepresentation, then the issue, when reduced to its simplest terms, appears to have been this: When a vendor makes a misrepresentation, though innocently, as to the quantity of the land he is selling, the quantity being qualified by "more or less," can a purchaser enforce specific performance with an abatement of the purchase-money for a deficiency? The deficiency amounted to one-tenth, representing a loss in value of $1,500 on a purchase price of $12,000. It could not be regarded, therefore, as an inconsiderable error or a small inaccuracy; it was neither an accidental slip nor an unintentional error since the statement as to quantities was deliberately made on the strength of an assessment notice. According to all the authorities already cited [7] it was too substantial

[7] *Supra.*

a deficiency to be covered by the words "more or less." The situation thus created is then fully met by the clear and well settled principle laid down in *Hill* v. *Buckley*:[8] "Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give: with an abatement out of the purchase-money for so much as the quantity falls short of."[9] The decision in the Privy Council appeal *Rutherford* v. *Acton-Adams*,[10] states the principle anew and is at the same time the latest pronouncement on it. Viscount Haldane, L.C., delivering the judgment of the Board said: "They (the Board) have examined the cases on the point decided both in this country and in New Zealand. The result of this examination is to satisfy them that the principle which applies ought to be laid down as follows. . . ." The Lord Chancellor first defines the right of a vendor suing for specific performance and then proceeds: "If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get and to have a proportionate abatement (for a deficiency) from the purchase-money." The principle was enunciated in almost identical terms in *Mortlock* v. *Buller*,[1] as far bask as 1804. The origin of its application is described by Farwell J. in *Rudd* v. *Lascelles*.[2] "In my opinion the jurisdiction (of a court of equity) to enforce specific performance on a vendor where the contract is silent as to compensation . . . probably first arose in cases of a small deficiency in the quantity of the land sold, e.g., if a vendor contracted to sell 100 acres and only 90 acres, he could not resist specific performance on the ground that the contract was to sell 100 acres." It will be observed

[8] *Supra.*

[9] This sentence and more is quoted in the judgment in *Wilson, etc.* v. *Simpson;* and several of the authorities cited here were cited in the appeal and presumably in argument at the original hearing. Neither report contains the arguments of counsel, however, so it is impossible to gather what propositions the authorities were used to support.

[10] (1915), A. C. 866.

[1] 10 Ves. at p. 315.

[2] (1900) 1 Ch. at p. 818.

that the deficiency taken as an example was one-tenth, almost precisely the extent of the deficiency in the Ontario case.

The limitation of the issue in *Wilson Lumber Co.* v. *Simpson* to the discussion of a sale of a *lot* and a deficiency in *depth* may account for the statement in the judgment that there were no Canadian cases in point. Had the issue been stated in terms of *land* and *quantity* an authority would have been found in *Wardell* v. *Trenouth* already cited.[3] There the vendor had sold, *inter alia,* 300 acres more or less, on which there was a deficiency of 56 acres, and the purchaser was declared entitled to a decree for specific performance with compensation for the deficiency.[4] The view of the law which governed in this decision coincides with that expressed in the Western Canadian case of *De Clerval* v. *Jones,*[5] where Beck, J., said, "Speaking generally, such qualifying expressions, in my opinion, can be taken to meet the case only of a deficiency to the extent of a comparatively small proportion of the stated quantity and certainly cannot be taken to cover a deficiency of 63 acres out of 160."

Wilson Lumber Co. v. *Simpson* is also remarkable for its wide divergence from the well settled views of English law concerning the responsibility of a vendor for the representations which he makes as to quantities and the degree of carefulness in testing the accuracy of such representations required of a purchaser when entering into an agreement of sale. The vendor in that case admittedly made the representations as to quantities in reliance on an assessment notice. That is to say, an owner of land in possession, possessed, too, of the title deeds of the property, with maps and plans in the Crown Lands department or in registry offices open to public inspection,[6] was heard to say that, instead of measuring the property or consulting the title deeds or maps before making any representations as to quantities, those representa-

[3] *Supra.*

[4] The principle was also applied in *Allen* v. *Crowe,* 8 W. N. 454, decided after *Wilson, etc.* v. *Simpson.*

[5] 8 W. W. R. 300.

[6] Cf. the remarks in the judgment as to these maps being available for inspection by a purchaser, *supra.*

tions had been made on the strength of a notice which was not a document of title, was never intended to serve as the basis of representations in a sale of land, and had been issued by a corporate body which, in so far as it had any interest at all in the measurements set out in the notice, was interested in making them larger than they really were and incurred no penalty for so doing. On the other hand, a purchaser was regarded as under the obligation of verifying the vendor's representations as to quantities before entering into the agreement. English law allows no such latitude to a vendor nor imposes any such obligation on a purchaser. *In re Arnold*[7] Lord James observed: "Then it is said, 'if you had looked at the plan and looked at the property itself, and then read the particulars, you must have seen that there was some mistake, and you ought to have inquired and ascertained what that mistake was, and you would have found that you were not getting the whole of 490 acres but only a share of it.' That is not to my mind a very acceptable suggestion on the part of a vendor. If a man makes a description calculated to mislead, I do not think it well for him to say, 'if you had been very careful you would have found out the blunder.' How was it that he did not himself find it out? How can the vendors be heard to say that the purchaser ought to have found out for them the very blunder which they never found out themselves?" These views are merely a reiteration of those expressed in the much earlier case of *Martin* v. *Cotter*,[8] by Sir Edward Sugden, L.C. (afterwards Lord St. Leonards). "It is the duty of the seller," he says, "to ascertain the correctness of the description of the property sold; and he is not at liberty to make an inaccurate statement and then say it was the duty of the purchaser, before he bid, to institute inquiries and correct mistakes and misdescriptions in the particulars. . . . The seller has the means of making a true statement; the purchaser is ignorant; he knows nothing further than what the seller represents." And a statement of dimensions by a vendor implies actual measurement.[9]

[7] L. R. 14 Ch. at p. 281.
[8] (1846), 3 Jo. & Lat., pp. 505 and 507.
[9] *Per* Lord Westbury, L.C., *Cordingly* v. *Cheesebrough*, *supra*.

Then as to any obligation lying on a purchaser to verify, at the inception of a sale, a vendor's representations as to quantities, not only is there Lord James' opinion just cited that no such obligation exists, but *King* v. *Wilson* [10] decided that even when the purchaser was tenant in possession no duty lay on him to measure the premises for himself but he was entitled to rely on the vendor's representation as to the depth of the lot. Even intimate acquaintance with the property does not raise a presumption that a purchaser knows its dimensions.[1]

Again, it is stated in *Wilson Lumber Co.* v. *Simpson* that the price was a bulk sum and not a sum per foot of frontage on either street; and that the purchaser did not arrive at the price by an estimate of the value of the property at so much a foot. It is to be supposed that these facts were established by the evidence, since the mere circumstance of a bulk sum and not a price per foot being set out in the agreement of sale would not have raised a presumption that the price had not been fixed by a consideration of the number of feet of frontage. *Hill* v. *Buckley* [2] gives the rule; "Though land is neither bought nor sold professedly by the acre, the presumption is that, in fixing the price, regard was had on both sides to the quantity." *Leslie* v. *Thompson* [3] gives the effect of stating the quantities along with a lump sum: "The actual designation of the number of acres contained in the lot negatives the presumption of any intention on the part of the vendors to sell in the lump." Dart, *Vendors and Purchasers,* pp. 675 and 676, is to the same effect, and adds that in such circumstances the purchaser is entitled to compensation for a deficiency. His opinion is accepted in *De Clerval* v. *Jones,*[4] and in another Western Canadian case, *Franz* v. *Hansen,*[5] where Walsh, J., says: "It surely requires no evidence to establish the materiality of a statement as to the number of acres on a farm

[10] *Supra.*

[1] Dart, *V. & P.* (7th ed.), p. 676, and cases there cited.

[2] *Supra.*

[3] *Supra.* And see *Connor* v. *Price, supra.*

[4] *Supra.*

[5] 12 A. L. R. 406.

even if it is taken at a lump price, as was the case here, instead of at a price per acre based upon an estimated acreage."

The law on this point seems worth inquiring into because there appears to be an impression that by inserting a lump sum in an agreement of sale instead of a price per acre a vendor avoids the possibility of being held to have sold on the latter basis. Some standard forms of agreements of sale used to state the price per acre but none do so now it is believed. Ordinarily the total price and the acreage are given. Even if the acreage were left out altogether, the sale would still be at a price per acre because the mere description by section (or part) township, etc., of the land sold incorporates the township plan in the agreement, and the township plan always contains the acreage. In the same way the description of a lot in a sale agreement according to a plan of subdivision incorporates the plan and so the dimensions shown on the plan. In short, it would seem impossible to rebut the presumption in sales of land that unsubdivided land is sold by the acre and an urban lot at so much per foot of frontage save by inserting a clause to the effect that the sale was for a lump sum without regard to quantities. But it is at least doubtbful whether such a device would invariably achieve its purpose. It would obviously be intended to relieve a vendor from all responsibility for mistakes in quantity and would not be allowed to work injustice to a purchaser since "conditions of sale . . are always construed or applied in such a way as to prevent the vendor from dealing unfairly with a purchaser." [6]

Wilson Lumber Co. v *Simpson* was affirmed on appeal [7] when it was pointed out that the vendor had taken up the position that the purchaser could either have the land at the stipulated price or withdraw from the contract and concludes: "Clearly this is the utmost he (the purchaser) can expect." That is equivalent to holding that the vendor could rescind the contract. English equity would not have allowed the vendor any such right, for, "if there be a defici-

[6] *Per* Lindley, L.J., *Terry & White's Contract*, 32 Ch. Div. at p. 28.

[7] 23 O. L. R. 253.

ency (whether of estate, area or otherwise) capable of assessment at a money value, the purchaser may in equity exact specific performance of the contract with compensation for the deficiency provided this will not prejudice third parties or involve great hardship on the vendor."[8] The deficiency was clearly capable of assessment at a money value and the purchaser had so assessed it; there was no hardship in compelling a vendor to accept a smaller price for a property smaller than he had represented it to be; and no third parties appear to have been interested in the transaction.

[8] Dart, *V. & P.* (7th ed.), p. 43, and cases there cited; *Rutherford v. Acton-Adams, supra; Terry & White's Contract, supra.*

CHAPTER XIII.

The Place of the Acts in the Law of Real Property.

The claim has been made for the Torrens System that it "must be regarded as an entirely new system of conveyancing and real property law."[1] The claim would seem to be too large. Registration of conveyances is not new. It was first directed by the Statute 27 Hen. VIII. for bargains and sales in order to prevent the unexpected secrecy in conveyancing made possible by the Statute of Uses; the registration act of Henry VIII. being followed, after a long interval, by the Registry Acts of England and Ireland and, in Canada, by the various provincial Registry Acts. The rule that an unregistered instrument cannot pass an estate or interest in land as against a bona fide purchaser or the like without notice of the instrument is not new. The result of the rule is to render such an instrument void as against a bona fide purchaser or mortgagee, and all the Registry Acts were passed for the purpose of making unregistered deeds void against deeds registered by bona fide purchasers or mortgagees. Priority by registration is not new; witness the Registry Act of Ireland passed in the reign of Anne. The equitable doctrine of constructive notice was not abolished for the first time by the Torrens Acts. It had already been automatically done away with in Ireland by the rule of priority according to date of registration. Even the guarantee of title possesses no intrinsic novelty. It consists in an undertaking to pay the money value of a defect in title due to a mistake or misfeasance of a registrar. A registrar is a government official; and governments Imperial, Dominion and Colonial, have for some time accepted liability for loss caused by the acts or negligence of their officers.

The really new thing about the Torrens System, at all events as adopted here, consists in the limitation of the examination of title and estate to be made by a purchaser or

[1] Hogg, p. 710.

mortgagee or the like to a single muniment of title, the registered owner's certificate of title with such instruments as may have been incorporated in it by reference, either in the body of the certificate or by memorials endorsed, that is to say registered, on it. In order that a purchaser or the like may not have to go outside a certificate of title it is made conclusive evidence of the registered owner's title to his beneficial estate or interest in his property and of the nature or extent of that estate or interest; and an interest or estate in the property not recorded on the certificate is not to exist for a purchaser or anyone else transacting with a registered owner in reliance on his certificate of title unless such actual notice of the interest has been received as to ignore its existence would amount to a fraud upon the holder of it.

This limitation is intended for the relief and protection of all persons dealing with registered owners pre-eminent amongst whom are purchasers and mortgagees. But in order properly to appraise the effect of the introduction of the Torrens System of registration of title it should not be forgotten that the protection of bona fide purchasers and mortgagees against unregistered estates and interests is no new thing in the legal history of Western Canada. They are the persons expressly mentioned in the Registry Acts[2] against whom an unregistered instrument was declared to be fraudulent and void; acts descended by an easily traceable genealogy through the statute 35 Geo. III. c. 5 of Upper Canada from the English Registry Acts. The aim of the English acts is expressed in their preambles. They recite that persons who, through many years' industry in their trades and employments and by great frugality have been enabled to purchase lands or to lend money on land security, have been undone in their purchases or mortgages by prior and secret conveyances and fraudulent incumbrances, and not only themselves but their whole families thereby ruined. To prevent the perpetration of frauds of the kind on innocent purchasers and mortgagees an unregistered deed and even an unregistered devise in a will was to be "adjudged fraudulent and void against any subsequent purchaser or mortgagee for

[2] See for the North-West Territories Ord. 9 of 1879.

valuable consideration" without notice. The Ontario statute did not professedly aim at the prevention of fraud but to establish a system of registration of deeds in order that, when lands "shall be transferred or alienated by any Deed of Sale, Conveyance, Enfeofment or Exchange, or by Gift, Devise or Mortgage, a memorial of such transfer or alienation shall be made for the better securing and more perfect knowledge of the same." Nonetheless, it had the same end in view as the English acts, namely, the protection of a bona fide purchaser or mortgagee for valuable consideration, for it made an unregistered conveyance fraudulent and void as against such a purchaser or mortgagee without notice, and notice had to be actual and not constructive. These provisions were reproduced in the Western Canadian Registry Acts. The Torrens System, therefore, as applied to Western Canada, did not introduce, but rather developed and increased, the protection which a bona fide purchaser or mortgagee of land for valuable consideration had always enjoyed against prior dealings with the land purchased or mortgaged of which no actual notice had been received.

Again, long before the day of systems of registration of titles to land the bona fide purchaser who had acquired the legal estate without notice, actual or constructive, of an equitable estate has always been able to rely on equity refusing to dispossess him of that estate at the suit of the owner of the equitable estate.[3] To secure this benevolent neutrality on the part of courts of equity the purchaser had to show that he had exercised the degree of prudence demanded of him by such a court in investing the vendor's title.[4] In establishing a register of deeds or assurances the Registry Acts lightened the purchaser's labours in that regard by limiting his investigation to registered deeds, and they also relieved him from the operation of the doctrine of constructive notice. The Real Property and Land Titles Acts substituted an official register of title for the old collection of common law assurances and confined the examination of title within a still narrower area, the last official certificate of

[3] *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.

[4] Maitland, *Equity*, p. 124.

title and instruments registered since its date; and they continued the abolition of the doctrine of constructive notice. But they have done more. Before their day a purchaser of land had to rely upon the judgment and care of a practising conveyancer, and if the one proved mistaken or the other relaxed into remissness to the purchaser's loss he could only recover damages for proved incompetence or negligence, the value of which remedy depended upon the continued existence and solvency of the conveyancer. By creating an order of official conveyancers or registrars and rendering a permanent and always solvent fund liable for payment of the money value of any defect in a title due to the mistake or misfeasance of a registrar the Acts as nearly as possible guaranteed a purchaser's title.

The claim that the Torrens System has worked a great change in real property law does not, at least as yet, hold good of this country. Experience of conveyancing under the Acts impresses with the fact that it is but little concerned with the law of real property outside the procedure which the Acts have established. This is due in part to the character of that procedure but also, in a large measure, to there being but one tenure, the fee simple, and to the absence of much variety in transactions in land, which consist, in the main, of simple sales and mortgages. But when transactions of a more complicated character do present themselves resort must always be had to the great body of common law and equity, modified indeed, occasionally, by acts of parliament, Dominion or provincial, but not by the Real Property or Land Titles Acts.

THE PARALLEL ACTS.

NOTE.—This table does not make any claim to perfect accuracy in the sense that parallel sections deal with a single subject-matter. Only a general parallelism has been attempted.

	Man.	Sask.	Alta.
I. TITLE	1	1	1
II. INTERPRETATION	2	2	2
III. ADMINISTRATION			
1. Registration Districts	5, 6, 14	3, 4, 6, 7	3, 4
2. Offices	13, 20	5, 21, 22	5, 6, 9
3. Officers	8, 9, 10, 11 15, 16, 18, 19 21	8, 9, 10, 11 12, 13, 14, 15 16, 17, 18, 19	7, 8, 9, 10 11, 12, 13, 14 15, 16, 18
4. Books	12	23, 25, 27 28, 29, 30	20, 21
5. Rules and Regulations	3, 4	212, 213 214, 215	152
6. Special Duties of Registrars	7	20, 24	17
IV. BRINGING LAND UNDER THE ACTS.			
1. By filing the Crown grant	29	46	26
2. By notification from Minister of the Interior of confirmed survey of townships containing lands granted to certain companies		47, 48	26
3. By filing a certificate of title issued under the Dominion Land Titles Act	31		
4. By Order-in-Council of the Lieutenant-Governor	32		
5. By application of owner:			
a. Who may apply	28, 36	31	27
b. Mode of application, etc.	22, 23, 24 25, 26, 27, 38 48, 49	32, 33, 37, 38 39, 41, 42 43, 44	28, 29, 30 31, 34, 35 36

c. Quantity of land which may be included in one application....	33	52	26
d. Mortgaged land	34, 106	34	26
e. Undivided interests	35		
f. Effect of application on old title	37		
g. Claims of other parties	43	35, 36, 39, 40	26, 32, 33, 34
h. Rejection of application	40, 41, 42		
i. Withdrawal of application	40, 41, 42	45	
j. Mortgage while application pending	105		
V. Withdrawal of Land From Under the Acts	39, 53		
VI. The Register.			
1. The Certificate of Title:			
a. Is conclusive evidence of title and estate	79	174	44
b. Definition of estate		59	42
c. When deemed to have been issued	72		
d. To be in duplicate	73, 74		
e. Date of	75		
f. Of a personal representative	76	143, 144	74
g. Transfer to new register	77		
h. Liabilities implied in	78	60	43
i. Priority when more than one certificate issued	80	174	
j. Is prima facie evidence of seal, etc.	81		
k. When void against person in actual possession	82	61	
l. Operates as an estoppel	85		
m. When adverse possession does not confer title	83	61	
n. Correction of error in, by registrar	55	66	114
o. Cancellation of, by registrar	55	67, 68	
p. Cancellation of, by order of a judge	58	73	116
q. Loss or destruction of	60, 61	69	123
r. Delivery of duplicate on order of registrar or judge		70, 71, 72	115
s. Consolidation of several certificates		67	122
t. Duplicate of, as evidence in suit for specific performance			136
2. Person transacting with registered owner need not inquire how he became such, nor after unregistered interests.....	89, 99	58, 194	41, 46, 135

THE PARALLEL ACTS—*Continued.*

	Man.	Sask.	Alta.
VII. MANNER OF REGISTRATION	90	11b	2(m) 22 24, 25
VIII. ORDER OF PRIORITY OF REGISTERED INSTRUMENTS	89	26, 63	23
IX. REGISTRABLE INSTRUMENTS.			
1. Transfer:			
a. Who may give	86	74	48
b. Form and contents	86	74	48
c. Transfer to owner and another jointly	87		
d. Transfer by personal representative to himself	87		
e. No words of limitation necessary	88	75	
f. Transfer of an easement		76	47
g. Must be accompanied by duplicate certificate of title		77	50
h. New certificate of title to issue		78	37, 39, 51
i. No survivorship		195, 196	137, 138
j. By sheriff		152	80
k. Implied covenants	97	64	40, 52
l. From husband to wife		201	
2. Mortgage and Encumbrance:			
a. Form	107	98	60
b. Has effect as a security	108	102	61
c. Transfer or mortgage of	109, 110, 111	117, 122, 123, 124	66, 67, 68
d. Transfer of, by personal representative of deceased owner		145	
e. Discharge of	112, 113, 125	118, 119, 120	63, 64, 65
f. Discharge of, by personal representative of deceased owner		121 145	
g. To secure payment for chattels		99	
h. Of unpatented land		100	60
i. Registrar to retain duplicate certificate of title		101	

j. Order for alimony		103	
k. Implied covenant for repair		104	69
l. Short forms of covenant		105	70
m. Hail insurance by mortgage		106	
n. Remedies and proceedings on default			
i. Entry into possession and distress	114, 115		
ii. Concurrent common law and equitable remedies	116	107	62
iii. Real Property Limitation Act	117		
iv. Entry into possession and taking rents, etc.	118	108	62*a*
v. Power of sale and transfer	119, 120, 121	109, 110, 111	62*a*
vi. Foreclosure	122, 123	112, 113, 114	62*a*
vii. Notice to registrar	124		
viii. Acceleration clause	126	115	
ix. Attornment		116	
x. Deposit of duplicate certificate of title with registrar	127		
xi. Implied covenant for further assurances		62	40
xii. Mortgage and assignment of mortgage	106		
3. Certificate of Judgment and Writ of Execution:			
a. Certificate of judgment to be registered	93		
b. Registrar's jurisdiction to settle the priority of a certificate	95		
c. Binding effect of writ		149	77
d. Satisfaction and withdrawal		150	78
e. Confirmation of sheriff's sale		151, 153	79, 81
4. Lease:			
a. Form	101	92	54
b. Implied covenants by lessee	102	93	55
c. Implied powers in lessor	103, 104	94	56, 57
d. Short forms of covenants		96	58
e. Determination		95, 97	59
f. Transfer of		122, 124	
5. Plans:			
a. Of subdivisions	62	80	124

THE PARALLEL ACTS—*Continued.*

	Man.	Sask.	Alta.
b. Streets and open spaces	63	80	124
c. Sale of lots before registration of plan	64	80	124
d. Of railway	66	81	53*a*
e. Of street under the Municipal Act	67		
f. Of road under the Highways Act		88, 89, 90	
g. Of road under the Public Works Act			125, 126
h. Requisitioned by registrar	69	79	53
i. Correction and cancellation of	65	86, 87	46, 130
j. Government plans	71	82, 83, 91	53
k. Special requirements		84, 85	
6. *Power of Attorney*	166	125, 126, 127	72, 73
7. *Caveat:*			
a. Against bringing land under Act	135, 136, 137		
b. Who may register, and form of	54, 138	128, 131, 132	84, 100
c. Registrar to give notice of to owner		133	86
d. Duration	139, 144, 145	136	89
e. Subsequent registrations subject to	140	134	87
f. Contents	141		85
g. Withdrawal	142	135, 137, 138	88
h. Compensation for damages	143	139	94
i. Discharge and lapse	146, 147, 148	135, 136, 138	91, 93, 95, 96
			99
j. Extension of time	150		90
k. Priority	151		97
l. Alternative proceedings	153		98
m. Security			92
8. *Party wall agreements*	96		
9. *Rejection of instruments*	91, 92		

10. Rights conferred by an unregistered instrument	98			
11. Duplicate certificate to be produced			50	
12. When duplicate certificate need not be produced			53	
13. Registered instruments to be kept in Land Titles Office			53	
14. Particulars to be entered by registrar			54	
15. Registration of instrument not in proper form	91		55	
16. Trusts to be registered	100		62	47
17. Transmission:				
a. Mode of application, etc.	128		141	74, 75
b. Title of deceased owner vests in personal representative			140	74
c. When personal representative deemed to become owner	128		142	74
d. Title of personal representative relates back to date of death of owner	128		143	74
e. Duplicate certificate to be cancelled			144	74
f. Personal representative to be deemed owner for purpose of all registered dealings			146	76
g. Removal of representative				76
18. Assignment for the benefit of creditors	129		147, 148	83*a*
X. Action of Ejectment	84		159	104
XI. Assurance Fund:				
1. Is liable to make good an omission, mistake or misfeasance of registrar	154, 157, 160 161		160, 161 168	108
2. And loss caused by fraud, error or misdescription in a certificate of title when land has been transferred bona fide for value by an applicant for registered title				105, 106
3. And when person properly liable for damages is dead or cannot be found, etc.	154		162	107, 111
4. Notice of action to be given Attorney-General	155		164	108
5. When plaintiff liable in costs			171	109
6. Within what time action to be brought	158		167	110
7. Fund not liable for damages through breach of trust, etc.	159		170	121

THE PARALLEL ACTS—*Continued.*

	Man.	Sask.	Alta.
8. How fund created	156, 162, 163	165, 190, 191 192, 193	117, 117*a* 118, 119, 120
9. Assignment of judgment to provincial treasurer		163	
10. Right of action not to abate through vacancy in office of registrar		166	
11. No action can be brought when claimant aware of possibility of loss		169	
XII. MISCELLANEOUS:			
1. Appeal from registrar	130	157	112
2. Summons	54, 56, 57, 59 131	180	146
3. Appeal to court	132, 133, 134	188, 189	147, 150, 151
4. Evidence	168, 169	176, 179 186, 187	134, 146
5. Attestation of instruments	94	56, 57	102, 103 145
6. Tax sales	50, 51, 52	154, 155, 156	82
7. Notices	44, 45, 46, 47	177, 178, 183 206, 208	45, 144
8. Substantial justice to govern	164		
9. Use of owner's name by interested parties	167	173	132
10. Abatement	170, 171	175	141
11 Persons under disability	172	203, 204	133
12. Penalties	173, 174		
13. Reference by registrar to master of titles or judge		158	113
14. Pleading		172	
15. Security for costs		181	146
16. Costs		182	149, 151
17. Enforcement of orders		184	150
18. Reference by judge to court en banc		185	148
19. Jurisdiction of court in contract, etc.		205	139

20. Estate tail	94	198, 199	
21. Entireties		200	
22. Address of owner or mortgagee to be given registrar		207	38
23. Proceedings under former laws			153
24. Tenancy in common		197	
25. New certificate of title to female owner on marriage		202	83
26. Evidence as to age		209	
27. Extension of time for filing		210	
28. Forms		211, 212	
29. Repeal		216	
30. Date on which Act comes into force		217	156
31. Assignment of agreement of sale			101
32. Proceedings pending when Act comes into force			154, 155

INDEX